Petition

81-1231

No. 81-....

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

BEDFORD ASSOCIATES, a Partnership, DORIS K. CARVER and SAMUEL ADES, individually and as partners of Bedford Associates, and AMCAR MANAGEMENT CORP.,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent,

—and—

THE BOWERY SAVINGS BANK,

Respondent.

BEDFORD ASSOCIATES, a Partnership, DORIS K. CARVER and SAMUEL ADES, individually and as partners of Bedford Associates,

Petitioners,

v.

THE BOWERY SAVINGS BANK,

Respondent,

—and—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

ARTHUR RICHENTHAL
Counsel for Petitioners
122 East 42nd Street
New York, New York 10168
Tel. No. (212) 687-8360

DAVID ABRAMS
IRVING M. MOSS
DONALD I. RICHENTHAL
Of Counsel

Questions Presented for Review

1. Does § 7 of the Public Buildings Act of 1959, as amended, 40 U. S. C. § 606, mandate the creation of a new federal common law rule of contract formation which abrogates the accepted principles of state and federal contract law requiring a "meeting of minds" to form a lease contract, because such statute requires approval by Congressional committees of a prospectus describing a proposed major lease by the United States as tenant?

2. Is an action to foreclose a mortgage of real property an "action . . . to adjudicate a disputed title to real property" within the meaning of 28 U. S. C. § 2409a so as to confer subject matter jurisdiction in the District Court because the United States claims a leasehold interest but there is no issue involving title?

---

* The captions of the cases in this Court list all parties to the proceedings in the Court of Appeals. Petitioner Amcar Management Corp. for its original Designation of Corporate Relationships, states as follows: It has no parent corporation, and no subsidiaries. Its sole stockholders are Michael Carver, son of Doris Carver, and his wife, and it has no affiliates except that petitioner Bedford Associates, a partnership, may be deemed to be an affiliate.

PAGE

Questions Presented for Review i

Opinions Below 1

Jurisdiction 2

Federal Statutes Involved 2

Statement 2

A. Background 2

B. GSA's Solicitation and Negotiations With Bedford 3

C. Award and Post-Award Negotiations 6

D. Bowery's Mortgage 7

E. Proceedings Below 8

Reasons for Granting the Writ 11

I—The court below erroneously construed the Public Buildings Act to fashion a new federal common law in radical departure from well-established state and federal law governing the formation of contracts. This is an important question of first impression 11

II—The "quiet title" statute, 28 U.S.C. § 2409a, does not confer subject matter jurisdiction over a mortgage foreclosure action in the District Court in which there is no dispute over title. This is an important question of first impression 18

Conclusion 23

PAGE

APPENDIX A—Opinion of Court of Appeals 1a

Dissenting Opinion of Judge Moore .. 40a

APPENDIX B—Opinion of United States District Court 47a

APPENDIX C—Opinion of United States District Court on Subject Matter Jurisdiction 85a

APPENDIX D—Order of Court of Appeals 90a

APPENDIX E—Order of Court of Appeals Denying Rehearing and Suggestion for Rehearing *En Banc* 93a

APPENDIX F—Section 7 of the Public Buildings Act of 1959, as amended, 40 U.S.C. § 606 (1980) 95a

APPENDIX G—28 U.S.C. § 2409a Real Property Quiet Title Actions 98a

APPENDIX H—28 U.S.C. § 2410 Actions Affecting Property on Which United States Has Lien 100a

TABLE OF AUTHORITIES

Cases:

Ansonia National Bank v. *United States*, 147 F. Supp. 864 (D.Conn. 1956) 18

Brown v. *General Services Administration*, 507 F.2d 1300 (2d Cir. 1974), *aff'd*, 425 U.S. 820 (1976) .. 23

Castle Brook Carbon Black Co. v. *Ferrell*, 76 W.Va. 300, 85 S.E. 544 (1915) 22

Colquitt v. *Roxana Petroleum Corp.*, 49 F.2d 1025 (5th Cir. 1931) 22

Fulcher v. *United States*, 632 F.2d 278 (4th Cir. 1980) 21

PAGE

Home Life Ins. Co. v. *O'Sullivan*, 151 App. Div. 136 N.Y.S. 105 (2d Dep't 1912) 23

Kinscherff v. *United States*, 586 F.2d 159 (10th Cir. 1978) 22

Mashpee Tribe v. *New Seabury Corp.*, 427 F. Supp. 899 (D. Mass. 1977), *aff'd*, 592 F.2d 575 (1st Cir. 1979) 23

Newman v. *United States*, 504 F. Supp. 1176 (D. Ariz. 1981) 23

Oates v. *Headland*, 154 Ala. 503, 45 So. 910 (1908) 22-23

Reading Steel Casting Co. v. *United States*, 268 U.S. 186 (1925) 12

Russell Corp. v. *United States*, 537 F.2d 474 (Ct. Cl. 1976), *cert. denied*, 429 U.S. 1073 (1977) 12

Tree Farm Development Corp. v. *United States*, 585 F.2d 493 (Ct. Cl. 1978) 12

United Security Corp. v. *Suchman*, 307 N.Y. 48, 119 N.E. 2d 881 (1954) 23

United States v. *Bedford Associates*, 491 F. Supp. 848 (S.D.N.Y. 1980) 2

United States v. *Bedford Associates*, 491 F. Supp. 851 (S.D.N.Y. 1980) 2

United States v. *Bedford Associates*, 657 F.2d 1300 (2d Cir. 1981) 2

United States v. *Braunstein*, 75 F. Supp. 137 (S.D.N.Y. 1947), *appeal dism'd*, 168 F.2d 749 (2d Cir. 1948) 12

United States v. *Davidson*, 139 F.2d 908 (5th Cir. 1943) 12-13

United States v. *Fallbrook Public Utility District*, 193 F. Supp. 342 (S.D. Cal. 1961), *aff'd in relevant part*, 347 F.2d 48 (9th Cir. 1965) 13

PAGE

United States v. *Georgia-Pacific Co.*, 421 F.2d 92 (9th Cir. 1970) 12

United States v. *King*, 395 U.S. 1 (1969) 23

United States v. *Mitchell*, 445 U.S. 535 (1980) 23

United States v. *Petty Motor Co.*, 327 U.S. 372 (1946) 12

Werner v. *United States*, 10 F.R.D. 245 (S.D. Cal. 1950), *aff'd*, 188 F.2d 266 (9th Cir. 1951) 13

Whalen v. *White*, 25 N.Y. 462 (1862) 23

Statutes:

28 U.S.C. § 1254(1) 2

28 U.S.C. § 1345 7

28 U.S.C. § 2409a ..... i, 2, 9, 10, 18, 19, 20, 21, 22, 23

28 U.S.C. § 2410 ..... 2, 19, 20, 21

Economy Act of 1932, 40 U.S.C. § 278(a) 17

Public Buildings Act of 1959 § 7, 40 U.S.C. § 606 (1980) ..... i, 2, 3, 4, 9, 10, 13, 14, 15, 16, 17

15 U.S.C. § 1431 (1980) 17

15 U.S.C. § 2081 (1980) 17

Rules and Regulations:

41 C.F.R. §§ 1-3.802-1(a), -2(a) (1979) 17

Administrative Decisions:

Matter of Keltec Industries Inc., 68-1 BCA ¶ 6989 (1968) 16

Data General Corp., 79-2 BCA ¶ 14,185 11

Other Authorities: PAGE

Cong. Rec. H-12987 (daily ed., July 8, 1959) 14

1972 U.S. Code Cong. & Admin. News, 4547, 4550, 4555 .....21, 22

General Services Administration Annual Report for 1980 11

Hearings on S216 Before Subcommittee On Interior And Insular Affairs, 92nd Cong. 2d Sess. (1971) 22

H.R. Rep. No. 557, 87th Cong., 1st Sess. (1959) 15

R. Nash, Jr. & J. Cibinic, Jr., Federal Procurement Law (1969) 12

W. Oleszek, Congressional Procedures and the Policy Process (1978) 16

S. Rep. No. 694, 86th Cong. 1st Sess., *reprinted in* [1959] United States Code Cong. & Admin. News 2291-93 15

Watson, *Congress Steps Out: A Look at Congressional Control of the Executive,* 63 Calif. L. Rev. 983 (1975) 15

No. 81-....

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

BEDFORD ASSOCIATES, a Partnership, DORIS K. CARVER and SAMUEL ADES, individually and as partners of Bedford Associates, and AMCAR MANAGEMENT CORP.,

Petitioners,

—v.—

UNITED STATES OF AMERICA,

Respondent,

—and—

THE BOWERY SAVINGS BANK,

Respondent.

BEDFORD ASSOCIATES, a Partnership, DORIS K. CARVER and SAMUEL ADES, individually and as partners of Bedford Associates,

Petitioners,

—v.—

THE BOWERY SAVINGS BANK,

Respondent,

—and—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Opinions Below

The majority and dissenting opinions of the Court of Appeals for the Second Circuit in these consolidated actions

are reported at 657 F.2d 1300 (1981), and are annexed as Appendix A, at pp. 1a-46a.[1]

The opinions of the District Court are reported at 491 F.Supp. 851 (S.D.N.Y. 1980) (Werker, J.) and 491 F. Supp. 848 (S.D.N.Y. 1980) (Werker, J.), and are respectively annexed as Appendix B, at pp. 47a-84a, and Appendix C, at pp. 85a-89a.

Jurisdiction

The order of the Court of Appeals sought to be reviewed is annexed as Appendix D, at pp. 90a-92a.

The single order of the Court of Appeals denying a rehearing on the respective petitions of petitioners and the United States of America is dated and entered October 8, 1981, and is annexed as Appendix E, at pp. 93a-94a.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Federal Statutes Involved

Section 7 of the Public Buildings Act of 1959, as amended, 40 U.S.C. § 606 (1980), the text of which is set forth verbatim in annexed Appendix F, at pp. 95a-97a.

28 U.S.C. § 2409a, the text of which is set forth verbatim in annexed Appendix G, at pp. 98a-99a.

28 U.S.C. § 2410, the text of which is set forth verbatim in annexed Appendix H, at pp. 100a-103a.

Statement

A. Background

These two consolidated actions involve a 21-story office building located at 120 Church Street in lower Manhattan, New York City ("building"), occupied by the Internal

---

[1] Citation herein to pages of each appendix will appear as follows: "App. , p. ."

Revenue Service ("IRS") as its Manhattan District Headquarters, the largest IRS headquarters in the country. From December 1963 through October 31, 1978, the IRS occupied the building under a lease entered into in 1962 between the General Services Administration ("GSA") and petitioner, Bedford Associates ("Bedford"), the owner of the building, a partnership of Doris Carver and her brother-in-law, Samuel Ades. The litigations arise out of a controversy as to whether a new lease to begin November 1, 1978 was made during the rocky course of negotiations carried on for 18 months into February 1979 between the GSA and Bedford; and the consequent decision of The Bowery Savings Bank ("Bowery") to declare a default on the mortgage it held on the building and foreclose the interests of Bedford and the United States ("Government").

The decision by the Court of Appeals is of first impression on each of the two issues presented. Its extension of subject matter jurisdiction to Bowery's foreclosure action opens the floodgates of the federal courts to mortgage foreclosure actions in every case where the sole interest of the Government is a claim of tenancy. In the Government's action against Bedford, its creation of a new federal common law rule rejecting the accepted federal and state principles of contract formation, *viz.*, the necessity for a "meeting of minds," has nationwide consequences affecting dealings between the Government and private parties in the multi-billions of dollars of Government leasing and construction projects which require approval by Congressional committees of prospectuses submitted by the GSA pursuant to § 7 of the Public Buildings Act of 1959 ("Act").

B. GSA's Solicitation and Negotiations With Bedford

In June 1977, GSA published a solicitation for offers, with responses to the solicitation required to be submitted by August 15, 1977, for improved contiguous space to be occupied by the IRS beginning November 1, 1978. Three responses were made, including one by Bedford for an annual rent of about $3,000,000 that contemplated renova-

tion of space in the building. None of the bids conformed in major respects to the solicitation, and GSA entered into negotiations with the three offerors. Because the other two bidders quoted substantially higher rents and each of their bids contained other unacceptable factors, the GSA concluded by late November 1977 that it would recommend to the IRS that Bedford be awarded the lease to be negotiated.

Negotiations between GSA and Bedford regarding its offer formally commenced on August 25, 1977 and continued until after November 1, 1978. During the course of such negotiations, various changes in the solicitation were introduced by the Government such as the amount of space in the building to be occupied by the IRS and the rent the Government was to pay for unrenovated space it would occupy during the renovation period, which could take up to 18 months to complete.

The solicitation had provided for an award by mid-April 1978, and specified November 1, 1978 as the date for delivery of fully renovated space. Consequently Bedford expected that the award of a contract would be reasonably prompt so that it could commence renovations in early 1978 and complete a substantial portion of the renovations by November 1, 1978. Both sides recognized that Bedford could not start the renovations without GSA's award. This schedule, however, became impossible because of the Government's unexplained delays in submitting a prospectus to Congress. The Act requires that the Public Works Committees of the House and Senate, respectively, approve a GSA "prospectus" where the average annual rental is in excess of $500,000. The prospectus is to briefly describe the space to be leased and its location and an estimate of the maximum cost to the Government of the space to be leased.

During the negotiations in early 1978, and because of the Government's delays, Bedford, by letter dated March 2, 1978, submitted to the GSA a flat-rate formula for rent during the renovation period in place of its original November 1977 rent proposal based on a sliding scale for the renovation period. The GSA officials stated to Bedford that

the flat-rate, when compared to the sliding scale, appeared reasonable but it could not be acted upon until after the Congressional committees approved the GSA's prospectus. Bedford was informed by the GSA that its March 2 flat-rate rental formula proposal would be deferred until after an award was made and Bedford "should reserve all further changes." However, unknown to Bedford, in late March 1978 the GSA's contracting officer had concluded that "we don't want the March 2 proposal."

Between February 28, 1978 to September 27, 1978, Bedford acceded to seven successive requests by the GSA for extensions of time to allow the Congressional committees to act on the prospectus. The prospectus was not sent by the GSA to Congress until June 8, 1978. No explanation was offered by the Government for this delay which made Bedford's proposals economically not viable.

Meanwhile, during July 1978, a dispute developed between Bedford and GSA as to whether negotiations were still open. GSA had not terminated negotiations in accordance with its Leasing Handbook which calls for advance written notice of a negotiation cutoff date and an opportuniy to submit a "best and final offer." In a July 1978 letter granting GSA an extension of time to accept Bedford's offer, Bedford referred to its expectation of further negotiations. GSA wrote back claiming that Bedford's offer was "final" and not subject to further negotiations, but it did not state which of Bedford's many letters amending Bedford's original response to the solicitation the GSA considered to be included in Bedford's "offer." At other times, however the GSA indicated to Bedford that the open matters could and would be discussed after an award. The dispute continued through September 1978 with Bedford reiterating its expectation of additional negotiations. The GSA, while claiming that Bedford's "offer" could not be changed, also advised Bedford that the terms would be discussed once Congressional approval of the prospectus was obtained and an award made.

In late September 1978, the GSA requested a further extension of time to October 30, 1978 to accept Bedford's

"offer" as well as an extension of time within which to exercise the already expired option for a five-year renewal term under the 1962 lease. GSA's negotiators threatened to exercise the option which had expired by May 1, 1978, to terminate all efforts to make a new lease, and to "smother" Bedford in court unless Bedford granted another extension of time to GSA to accept Bedford's "offer." Bedford acceded and granted such extension of time.

C. Award and Post-Award Negotiations

Bedford had been led to believe that after Congressional approval of GSA's prospectus there would be an award and then post-award negotiations leading to a lease. During the negotiations, the GSA had described to Bedford the award as being "in essence a letter of intent . . ." It was understood that GSA procedure would involve further negotiations after the award and prior to entering into a finalized written lease. Indeed the prospectus itself referred to "[t]he proposal for negotiating a 10 year succeeding lease . . ." and no proposed lease was submitted with the prospectus to the Congressional committees.

As the District Court found, which finding was accepted by the Court of Appeals, with respect to Bedford's March 2, 1978 rent formula and the other open items (App. B, p. 69):

> "Had Bedford not believed that this proposal and other terms of the contract would be discussed further after an award, it would not have continued to grant the Government extensions of time in which to accept an offer it knew was no longer economically feasible. Bedford clearly did not intend to be bound until the outstanding items had been resolved."[2]

---

[2] In addition to the rent to be paid during the renovation period, other open terms which were never resolved included the amount of space in the building the Government was to occupy and the cost of overtime services (App. B, pp. 53-56). The Court of Appeals majority concluded that the latter two unresolved terms were "relatively insignificant" and thus did not constitute a fatal indefiniteness albeit the gap between the parties' disparate positions was approximately $235,000 annually for ten years (App. A, pp. 22-23).

Congressional approval of the prospectus filed by the GSA was granted on October 4, 1978. Such prospectus had never been seen by Bedford. An award letter from GSA purporting to accept Bedford's offer was delivered to Bedford on October 30, 1978. That letter of October 30, 1978 was Bedford's first notification of the documents that the GSA considered as constituting Bedford's "offer." It revealed that the GSA took the position that the sliding scale rent formula during the renovation period contained in Bedford's November 1977 letter was part of Bedford's "offer" and had not been superseded, as Bedford believed, by its March 2, 1978 flat rate rent formula which was to be the subject of continuing negotiations after the award.

While the parties continued to negotiate, GSA tendered a proposed lease to Bedford on December 13, 1978. By letter dated December 15, 1978 Bedford formally rejected the proposed lease as inconsistent with the solicitation and award and further stated that Bedford was prepared to "negotiate a lease which is fair and acceptable to all parties." A GSA audit had confirmed Bedford's claim that the GSA's proposed lease was financially impossible for Bedford to perform; it estimated that Bedford would lose over $500,000 per year during renovations and almost $150,000 annually thereafter.

The GSA continued to negotiate with Bedford during January and February of 1979 on the open issues, but the parties were unable to resolve their differences. Meanwhile, the Government continued to occupy the space it had under the 1962 lease which had expired on October 31, 1978.

D. Bowery's Mortgage

Bedford had fallen in arrears in its payments under an existing mortgage to the Bowery and in payment of real estate taxes, for which nonpayment Bowery had not declared a default until March 20, 1979, apparently awaiting the result of the lease negotiations with the Government. On March 20, 1979, Bowery elected to declare the entire

mortgage principal of over $10,000,000 to be in default by the institution of an action in the District Court to foreclose its mortgage and for other relief.

E. Proceedings Below

The Government commenced its action on March 21, 1979 in the District Court, basing jurisdiction on 28 U.S.C. § 1345, seeking a temporary restraining order and preliminary injunction against Bedford terminating services and closing the building. The Government amended its complaint to also seek specific performance of a lease in accordance with the award, and damages.

On March 20, 1979, Bowery commenced in the District Court an action in which it sought in the second claim in its complaint a judgment of foreclosure of its mortgage on the building, naming Bedford and the Government as defendants. The Bowery's action purported to base jurisdiction in the District Court

> "on §§ 1346(f), 2201, 2202, 2409a(a) and 2410(a) of Title 28, United States Code, the doctrines of pendent and ancillary jurisdiction, and §§ 301, 302 and 313 of the New York Civil Practice Law and Rules."

Bowery further alleged that with respect to its claim to foreclose its mortgage on the building:

> "[T]he United States is a necessary party defendant to this action by virtue of 28 U.S.C. §§ 2409a(b) and 2410(c), and § 1311 of the New York Real Property Actions and Proceedings Law."

Bedford as well as the Government, in their respective answers to Bowery's complaint, asserted as an affirmative defense that the District Court "lacks jurisdiction over the subject matter of this action."

The trial on the merits of both actions, which had been consolidated, was conducted by Judge Werker in March 1980. Judge Werker's opinion found that no lease had

been made entitling the Government to continue to occupy the building after November 1, 1978 (App. B, pp. 68, 70):

> "The record clearly demonstrates that Bedford did not intend to be bound until the entire leasing agreement was completed and reduced to a fully integrated contract.
>
> * * *
>
> Because Bedford reasonably believed that the terms of the proposed lease would be further negotiated after an award, and because there was no meeting of the minds as to a number of essential items, no contract was made."[3]

With respect to Bowery's mortgage foreclosure action, Judge Werker held, in accordance with his prior opinion dated March 18, 1980 (App. C, p. 85) that there was subject matter jurisdiction in the District Court over Bowery's mortgage foreclosure action under the "quiet title" statute, 28 U.S.C. § 2409a.

On the Government's appeal to the Court of Appeals, that court essentially accepted Judge Werker's findings of fact. Nevertheless, the panel, in a two-to-one decision issued on March 31, 1981, held that, as a matter of law, Bedford was bound to an enforceable lease contract.[4]

The majority's rationale was that, despite the absence of Bedford's contractual intent to be bound manifested to and known by the GSA, such result of imposing a contract upon Bedford was required "as a matter of federal law

---

[3] Judge Werker also found that the lease claimed by the Government was so tainted by the Government's misrepresentations, duress, failure to bargain in good faith, failure to comply with its own regulations, and unexcused delays in processing Bedford's bid and so one-sided in the Government's favor as to render any alleged contract, even if one were formed, unconscionable (App. B, pp. 70-74).

[4] The majority opinion was written by Judge Kearse with Judge Mulligan concurring. Judge Moore dissented from the majority's holding that a contract had been formed

and regardless of the status of the bargain under general contract law'' because of the Act (App. A, pp. 20-21).

Moreover, the Court of Appeals held that, although the parties had failed to agree upon a material term, viz., the rent the Government would pay during the renovation period, such failure does not, as it would in "an ordinary commercial case involving private parties'' (App. A, p. 24), compel the conclusion that the parties had not formed a contract because "[i]n the realm of government leases, however, things are necessarily otherwise" (App. A, p. 25). The majority further stated that "indeed unlike an ordinary government contractor, a prospective lessor to the government" (App. A, p. 25), because of the Act, cannot change or withdraw, without the Government's consent, any prior amendatory proposal to its original bid without the Government's consent (App. A, p. 26). It reached this conclusion even though the Government knew that Bedford in March 1978 had withdrawn its prior amendatory proposal of November 1977.[5]

The Court of Appeals unanimously affirmed the judgment of foreclosure in favor of Bowery against Bedford and the Government, holding that there was subject matter jurisdiction in the District Court over such mortgage foreclosure under the "quiet title'' statute, 28 U.S.C. 2409a (App. A, pp. 32-37).

---

[5] The Court of Appeals also held, again without disturbing any of the District Court's underlying findings of fact, that the inequitable conduct of the Government precluded it from obtaining specific performance but did not rise to a level of unconscionability, and, on remand, the Government was entitled to try the issue of damages at law for breach of the lease contract (App. A, pp. 27-31). The Government claims that such remand leaves the individual owners liable in damages for substantial millions of dollars.

REASONS FOR GRANTING THE WRIT

I

The court below erroneously construed the Public Buildings Act to fashion a new federal common law in radical departure from well-established state and federal law governing the formation of contracts. This is an important question of first impression.

The decision of the Court of Appeals has nationwide consequences, impacting on the multi-billions of dollars of leases for space for which the Government negotiates, subject to Congressional committee approval of prospectuses pursuant to the Act.[6] Such decision, moreover, is, as Judge Moore states in his dissent, an "extraordinary" departure from fundamental principles of state as well as federal contract law governing the formation of private and government contracts (App. A, pp. 40-41, 46).

> "The 'rules' which the majority would construct would be the elimination of the centuries-old fundamental essential of a valid agreement, namely, that before a valid contract comes into existence there must be a 'meeting of the minds' of the parties.
>
> * * *
>
> As I foresee the future with Cassandra-like foreboding, a lease will have to be written for the parties by federal courts. I believe this possibility can be avoided by adhering to the requirement that there be a meeting of the minds at the outset."

---

[6] The GSA's Annual Report for 1980 shows that the Government occupied 90,500,000 square feet of leased space in 1980 (p. 5). Such Annual Report further discloses (p. 22):

> "In fiscal 1980, GSA received congressional approval of 62 prospectuses, valued at over $1.9 billion, to provide federal working space through new construction, lease construction, and leasing (approvals in 1979 were only $173 million). The bulk of the 1980 approvals ($1.5 billion) was for leasing."

Furthermore, the fashioning by the majority of the Court of Appeals of a new rule of federal contract law was adopted *sua sponte* without the benefit of briefing and arguing the statutory issue which is the basis of its decision. Certainly one would have expected that the Government would have strenuously and directly urged the theory of the majority if it had any merit.

The majority opinion below is not only contrary to every state law governing the formation of contracts but is inconsistent with the principles applied to Government contracts. As the leading commentators on Government contracts observe, "[T]he common law rules of offer and acceptance form the foundation of the Government contract formation process," R. Nash, Jr. & J. Cibinic, Jr., *Federal Procurement Law,* 191 (1969).[7] Government contracts follow the same principles that apply to contracts between individuals. E.g., *Reading Steel Casting Co.* v. *United States,* 268 U.S. 186, 188 (1925).

Thus, the majority of the Court of Appeals cannot justify its conclusion merely by choosing to apply federal contract law rather than state law. Federal law, like state law, holds that a "meeting of minds" is an essential requisite to forming a government contract. *Russell Corp.* v. *United States,* 537 F.2d 474, 481-82 (Ct. Cl. 1976), *cert. denied,* 429 U.S. 1073 (1977); *accord, Tree Farm Development Corp.* v. *United States,* 585 F.2d 493, 499-500 (Ct. Cl. 1978).[8]

---

[7] *See,* e.g., *United States* v. *Georgia-Pacific Co.,* 421 F.2d 92 (9th Cir. 1970); *United States* v. *Braunstein,* 75 F.Supp. 137 (S.D.N.Y. 1947), *appeal dism'd,* 168 F.2d 749 (2d Cir. 1948); *Data General Corp.,* 79-2 BCA ¶ 14,185 at 69,831-33 (material variance between Government's purported acceptance and offer precluded meeting of minds and, therefore, a contract).

[8] Because federal and state law are in harmony here, the choice of law is not dispositive. The applicability of federal law is not free from doubt, however. Government leases and other realty interests have been held subject to state law. *See United States* v. *Petty Motor Co.,* 327 U.S. 372, 380 (1946); *United*

(footnote continued on following page)

The majority of the Court of Appeals, in reversing Judge Werker's conclusion that no lease had been formed between Bedford and the Government, did not set aside Judge Werker's findings of fact that (1) Bedford had no intent to be bound to a contract of lease until all outstanding items had been resolved, (2) Bedford manifested to the Government Bedford's intent not to be bound and its belief that the terms would be renegotiated after an award, (3) the Government knew that Bedford did not intend to be bound, and (4) Bedford manifested to the Government before the award that several terms remained open for negotiation, including the material term of the rent to be paid by the Government during the renovation period (App. A, pp. 18, 24-25). Nevertheless, the majority held that the Act required the imposition of a contract upon Bedford as a matter of law, despite the absence of contractual intent and a "meeting of minds" and the indefiniteness of a significant term which would preclude the formation of a contract in "an ordinary commercial case involving private parties."

The rationale of the Court of Appeals' majority was that the provision for Congressional review of prospectuses under the Act requires this result, although neither the language, the stated purpose nor the legislative history of the Act indicate that Congress intended to revoke established principles of law governing the formation of Government leasing contracts.

The Act contains absolutely no language requiring the proposal embodied in GSA's prospectus to be binding on

---

(footnote continued from preceding page)

States v. *Davidson*, 139 F.2d 908, 910-911 (5th Cir. 1943); *United States* v. *Fallbrook Public Utility District*, 193 F.Supp. 342, 347 (S.D. Cal. 1961), *aff'd in relevant part*, 347 F.2d 48, 54 (9th Cir. 1965); *Werner* v. *United States*, 10 F.R.D. 245, 247 (S.D. Cal. 1950) ("Validity of [a government] lease . . . and the rights of the parties . . . are governed by the law of California where the land is situated and the lease was made."), *aff'd*, 188 F.2d 266 (9th Cir. 1951).

the prospective private lessor. The Act does not provide that a prospectus presented by GSA to the House and Senate Public Works Committees must be "a definite offer respecting the premises" as the majority seems to believe (App. A, p. 21). The Act specifically state that a prospectus need include only "a brief description" of the space to be leased, its location and an "*estimate* of the maximum cost" to the Government of the space to be leased, 40 U.S.C. § 606(a)(1)-(2) (emphasis added).[9]

The Act, moreover, contains nothing that prohibits or even discourages the continuation of negotiations between GSA and a prospective lessor *after* approval by the Congressional committees. Rather, the Act explicitly authorizes GSA, without further committee approval, to exceed the estimated maximum cost stated in a prospectus by 10% for the increased cost of alteration to the premises (40 U.S.C. § 606(b)).

Furthermore, the Act does not bar the GSA from seeking further approval should GSA's final bargain exceed the estimate approved by the committees. As one of the Act's sponsors explained:

> "If the maximum costs of construction or alteration should, due to price advances, be increased by more than 10 percent, the Administrator must secure *further additional authorization* of the congressional Committees." (emphasis added.)

Cong. Rec. H-12987 (daily ed., July 8, 1959) (remarks of Mr. Mack).

In short, the Act does not preclude GSA from submitting a prospectus which is no more than a proposal for future projects or, in the Court of Appeals majority's phrase, a "bundle of suggestions" (App. A, p. 21). Indeed, when Congress desired to reserve review over GSA final contract terms, its appropriation acts conditioned GSA's expendi-

---

[9] Other information which the Act requires prospectuses to contain is unrelated to the terms of offers. *See* 40 U.S.C. § 606 (a)(3)-(6).

ture of previously appropriated funds upon a second round of committee approvals.[10]

Significantly, GSA's prospectus submitted to the Congressional committees did not even include a proposed lease and, as Judge Moore points out: "That the prospectus was to authorize negotiations is equally clear: '*The proposal for negotiating* a 10 year succeeding lease is actually an alternative to exercising the 5-year option that GSA already has' " (App. A, pp. 43-44) (emphasis added). The Congressional committees, as appears in the Congressional Record of the Senate,, were informed that Bedford "will not undertake the needed work unless a new lease is negotiated" (App. A, pp. 43-44).

Likewise, the majority opinion completely misapprends the purpose of the Act. The Act does not require the Congressional committees to undertake a "review of the overall propriety of major leases" as the majority of the court below states (App. A, p. 19). The purpose of the Act, as stated in its outset, is: "(a) In order to insure the equitable distribution of public buildings throughout the United States . . ."

As both the Senate and House Committee reports make clear, the problem the Act expressly aimed to resolve was the lack of coordination between the GSA and Congress over the geographical distribution of Government buildings.[11]

Moreover, the Act is only one step in the process of authorizing and funding Government projects. For in-

---

[10] See statutes collected in Watson, *Congress Steps Out: A Look at Congressional Control of the Executive*, 63 Calif. L.Rev. 983, 1024-25 & nn. 214-15 (1975).

[11] The Act's primary purpose was to improve upon previous practice, where space acquisitions for agencies were authorized by the various Congressional committees having general jurisdiction over the respective agencies. To establish an "orderly or systematic approach to the acquisition of general purpose public buildings," the Act gave GSA and the Committees the clearinghouse function. S.Rep. No. 694, 86th Cong., 1st Sess., *reprinted in* [1959] United States Code Cong. & Admin. News 2291, 2292, 2293; *see also* H.R. Rep. No. 557, 87th Cong., 1st Sess. (1949) at 3.

stance, the Act expressly authorizes the committees to rescind their approvals if an appropriation is not made within a year, 40 U.S.C. § 606(c). Thus, Congressional committee approval is, as the Act itself recognizes, inherently tentative and refutes the Court of Appeals' presumption—wholly unsupported by any evidence in the more than 4000 page record—that the prospectuses submitted by GSA must incorporate the *final* terms of proposed leases.[12]

The majority's assertion that Congressional committee review of prospectuses would not be possible "if offerors were free to withdraw or amend their offers at will" (App. A, p. 26) is directly contradicted by the indisputable fact that Bedford's "offer" would have expired while the prospectus was before the committees unless Bedford agreed to extend it. The District Court found as a fact, accepted by the Court of Appeals, that Bedford would not have agreed to such extension if it believed that its November 1977 sliding scale rent proposal during renovation was not changed by its March 1978 flat rent proposal (App. B, p. 69). An offeror may condition his extension of an offer upon alteration of its terms.[13] Thus, even if the majority of the court below is correct that Bedford's March 1978 fixed rent formula proposal was ineffective as a matter of law to replace its November 1977 proposal, such March 1978 proposal was certainly operative when Bedford thereafter agreed to several extensions of the time within which the Government could accept its "offer."

Apparently animating the majority's fashioning of a new federal rule of contract law was the concern that,

---

[12] The Act gives the "authorization" function to the Public Works Committees. But, before an authorized program may be implemented, funds must be "appropriated." It is in the Appropriations Committees, not in the Public Works Committees, where Congress truly exercises its "power of the purse." *See* W. Oleszek, *Congressional Procedures and the Policy Process* 204-05 (1978).

[13] *See Matter of Keltec Industries Inc.*, 68-1 BCA ¶ 6989 at 32,321-22, 32,324 (1968).

unless Bedford was bound to a contract it did not intend to make, this "would permit lessors such as Bedford, and indeed GSA itself, to evade statutory limitations on the procurement process and to frustrate Congress' supervision of that process . . ." (App. A, p. 20). But such spectre, and the conclusion that a special new federal common law rule is necessary for the procurement of Government leases, overlooks an uncontestable fact. The entire Government successfully contracts for billions of dollars worth of goods and services, involving Governmental interests at least as important and complex as the procurement, renovation and occupancy of a 21-story office building, by adhering to the very basic principles of contract law which the majority of the Court of Appeals found inadeqate to protect the Government in the instant case. Surely, it is inconceivable in light of the language, purpose and history of the Act that Congress singled out Government leases costing more than $500,000 per year to impose new special contract formation rules.[14] Contrary to the majority's view (App. A, p. 20, n. 7), the statutory scheme does not indicate a need for fashioning such special rules.[15]

---

[14] The Act is not alone in requiring prospectus approval. Under 15 U.S.C. § 1431 (1980) and § 2081 (1980), the Transportation Department and the Consumer Products Safety Commission, respectively, submit prospectuses which propose the planning or designing of certain facilities, as well as construction. Inasmuch as prospectuses for plans and designs contemplate the purchase of services, which are subject to the general procurement regulations at 41 C.F.R. §§ 1-3.802-1(a),-2(a) (1979), *see* (App. A, p. 25), these statutes demonstrate that the prospectus approval process can operate in harmony with the general government contracts rule that offers may be withdrawn at any time before acceptance and that negotiations must be terminated by a call for a "best and final offers," as GSA failed to do contrary to its own Leasing Handbook (App. A, p. 25, n. 11).

[15] The majority also referred to, but did not heavily rely upon, the Economy Act of 1932, 40 U.S.C. § 278(a), which limits annual rent payable by the Government to 15% of the fair market value of the leased premises. Compliance with the Economy Act is enforced by GSA and is not the subject of Congressional approval.

Moreover, the majority's concern that its new rule of federal contract formation law was necessary to prevent the GSA from violating the "statutory limitations on the procurement process" cannot justify imposing a contract on Bedford which Bedford did not intend to make. Bedford neither received a copy of GSA's prospectus nor knew that GSA in June 1978 had submitted to the Congressional committees a prospectus containing the November 1977 rent formula even though Bedford had withdrawn it in March 1978, and upon the basis of which withdrawal, Bedford subsequently extended the time within which the GSA could accept its "offer." It violates basic notions of justice and due process to sentence Bedford's partners to economic disaster by subjecting them to multi-millions of dollars of damages for breach of a lease which Bedford had manifested an intent not to make, and to bind it to a contract because the GSA submitted to Congress a prospectus to which Bedford had not agreed and never saw.

II

The "quiet title" statute, 28 U.S.C. § 2409a, does not confer subject matter jurisdiction over a mortgage foreclosure action in the District Court in which there is no dispute over title. This is an important question of first impression.

Under the decision below, there is extended for the first time to the District Court subject matter jurisdiction over mortgage foreclosure actions even though the United States does not have nor claim a mortgage or other lien. The sole linkage of the Government to the real property being foreclosed is a claimed leasehold interest. Thus, the decision by the Court of Appeals, affirming the judgment of foreclosure in the action brought by the Bowery, expands the subject matter jurisdiction of the District Court to mortgage foreclosure actions between nondiversity private parties in every case where the United States is named as a defendant because of a claimed leasehold interest.

Prior to the decision below, no court had ever held that the United States could be sued in a mortgage foreclosure

action except pursuant to 28 U.S.C. § 2410, which statute permits the United States to be sued in a mortgage foreclosure action, but only if it asserts a mortgage or other security interest. *Ansonia National Bank* v. *United States*, 147 F.Supp. 864, 865 (D. Conn. 1956). The only interest in the building claimed by the Government was a leasehold.

The decision below thus departs from the fundamental principle of narrowly reading the statutory jurisdiction of District Courts and the equally settled principle that the United States may be sued only when Congress has clearly and unequivocally expressed its consent for such suit.

The error of the court below in extending subject matter jurisdiction to the District Court is of momentous consequence to Bedford in view of the holding by that court that Bedford was bound by a lease with the Government. Such dual holding allows the Bowery to proceed with its foreclosure and, under 28 U.S.C. § 2409a(b), the Government, as provided in the Court of Appeals decision, must elect, within 60 days from the issuance of the Court of Appeals' mandate, either to vacate the building or condemn some interest in it. The Government has, in fact, now made such election to condemn a leasehold interesst in the building effective December 14, 1981. The Government is now claiming in the damage trial, on remand, against Bedford that Bedford is liable in damages to it measured by the amount of just compensation that the Government will be required to pay by reason of such election, an election which the Government contends it would not have made if the foreclosure action could not have been maintained against it.[16]

---

[16] There was no economic reason for Bedford to appeal to the Court of Appeals on the subject matter jurisdiction issue of the Bowery's foreclosure action in light of the District Court's holding that the Government was occupying as a holdover tenant and had no lease and, therefore, the Government had to pay since November 1, 1978 a fair market rental. Such fair market rent would have enabled Bedford to refinance the Bowery's mortgage before consummation of the foreclosure sale.

The Court of Appeals decision makes it perfectly clear that the sole statutory basis for vesting the District Court with jurisdiction to direct a mortgage foreclosure against the Government is 28 U.S.C. § 2409a. Thus the court below states (App. A, p. 34):

> "The meaning of the phrase 'adjudicate a quiet title' [in 28 U.S.C. § 2409a] presents a federal question, the answer to which must be sought in federal law. Accordingly, we must squarely confront that question and determine whether § 2409a permits a foreclosure action to proceed against a leasehold interest of the United States."

The Court of Appeals answered that question in the affirmative, although it stated that "the question is a relatively close one . . ." (App. A, p. 36). The Court of Appeals erred. Its decision is contradicted by the express language as well as by the legislative history of 28 U.S.C. § 2409a and the comparison of that statute with 28 U.S.C. §2410, which shows that Congress has traditionally treated quiet title and mortgage foreclosure actions as separate and distinct.

In 1948, Congress enacted 28 U.S.C. § 2410 to permit the United States to be named a party in certain real property actions in which the United States "has or claims a mortgage or other lien." Section 2410 expressly and separately listed actions "(1) to quiet title to" and "(2) to foreclose a mortgage or other lien upon" real property. This demonstrates that Congress did not intend to encompass mortgage foreclosure actions under the rubric of a "quiet title action."

In 1972, Congress enacted § 2409a and singled out only a quiet title action from the other types of actions listed in § 2410 in which the United States could be sued, removing the limitation contained in § 2410 that the United States could be sued only where it has or claims a mortgage or other lien.

Section 2409a does not *in haec verba* encompass mortgage foreclosure actions. Indeed the section is captioned "Real

Property Actions to Quiet Title." The words "mortgage foreclosure" do not appear in § 2409a, in explicit contradistinction to the use of those words in § 2410.

Moreover, the legislative history expressly disclaims any intent to include mortgage foreclosure actions within the scope of § 2409a:

> "The remedy provided in the draft bill *does not apply to civil actions for partition of lands, or to foreclose a mortgage,* deed or trust or other security interest, or to cancel, remove or discharge a lien of any kind, or involving or relating to water rights." (emphasis added.)

1972 U.S. Code Cong. & Admin. News, 4547, 4555.[17]

The entire legislative history refutes any contention that Congress intended § 2409a to apply to any type of action other than the typical quiet title action. For instance, Congress described the purpose of § 2409a as follows (*Id.* at 4554):

> "The bill would allow the United States to be made a party to an action in the Federal district courts to quiet title to lands in which the United States claims an interest . . . Perhaps the most common application of the proposed statute would be in boundary disputes between the United States and owners of adjacent property."[18]

---

[17] The portion of the legislative history quoted consists of the comments of the Attorney General of the United States. As the Fourth Circuit has observed, the Department of Justice drafted the bill "which, with few modifications, was adopted. For this reason much of the legislative history is derived from the Attorney General's comments on his proposal." *Fulcher* v. *United States,* 632 F.2d 278, 283 (4th Cir. 1980).

[18] Indeed, the legislative history shows further that the entire thrust of the hearings on the bill focused upon one topic: extending jurisdiction to quiet title actions.

> "At the hearing on S.216 and related bills on February 24, 1972, much of the testimony related to some of the specific

(footnote continued on following page)

As the Court of Appeals for the Tenth Circuit recognized in *Kinscherff* v. *United States*, 586 F.2d 159, 160 (10th Cir. 1978):

> "The legislative history of section 2409a refers to the historical development of *quia timet* suits in the courts of equity in England, and to quiet title suits as developed in this country. U.S. Code Cong. & Admin. News, 1972, Vol. 3, p. 4547. It thus must be assumed that *Congress intended to permit to be brought against the United States the typical quiet title suit*, as it has developed in the various states in this country through statutory and case law." (emphasis added.)

The "typical quiet title suit" does not include a mortgage foreclosure action, nor is there any merit in the Court of Appeals' statement that because the legislative history of § 2409a indicates that persons holding a lesser than fee interest may bring an action under § 2409a, a mortgagee can also bring suit pursuant to that section. Actually the intent of Congress to permit persons with such property interests as easements and leases to bring quiet title actions under § 2409a reflected only its purpose to waive sovereign immunity for the "typical" quiet title action, since at common law persons with interests less than a fee could bring an action to quiet title to remove clouds upon their interests. *Colquitt* v. *Roxanda Petroleum Corporation*, 49 F.2d 1025 (5th Cir. 1931); *Castle Brook Carbon Black Co.* v. *Ferrell*, 76 W.Va. 300, 85 S.E. 544 (1915); *Oates* v. *Headland*, 154

(footnote continued from preceding page)

> problems concerning title to lands which motivated, in part, the introduction of this legislation."

1972 U.S. Code Cong. & Admin. News, 4550. Review of the hearing referred to above reflects that *only* quiet title actions were mentioned; not one word was said about mortgage foreclosure actions. Rather, Senator Church, sponsor of the bill, stated quiet plainly during the course of the hearings that the bill's purpose was to "giv[e] people the right to go into court to clear title when there is a disputed title and the Government is involved." Hearings on S. 216 Before Subcomm. on Interior and Insular Affairs, 92d Cong., 2d Sess. at 21 (1971).

Ala. 503, 45 So. 910 (1908). Mortgagees, however, brought their suits at common law as mortgage foreclosure actions, not as quiet title actions. *United Security Corp.* v. *Suchman*, 307 N.Y. 48, 119 N.E.2d 881 (1954); *Whalen* v. *White*, 25 N.Y. 462, 469 (1862); *Home Life Ins. Co.* v. *O'Sullivan*, 151 App. Div. 535, 136 N.Y.S. 105 (2d Dept. 1912).

The Court of Appeals' determination that Congress has, by implication, subjected the United States to all mortgage foreclosure actions also squarely contradicts the principle that a waiver of sovereign immunity "cannot be implied but must be unequivocally expressed." *United States* v. *Mitchell*, 445 U.S. 535, 538 (1980); *United States* v. *King*, 395 U.S. 1, 4 (1969) ("suit may not be maintained against the United States in any case *not clearly* within the terms of the statute by which it consents to be sued"). This principle is more than a rule of statutory construction; it rests instead upon the "strong public policy" that Congress alone has the authority and power to waive sovereign immunity, and that "statutes waiving sovereign immunity must be strictly construed." *Brown* v. *General Services Administration*, 507 F.2d 1300, 1307 (2d Cir. 1974), *aff'd*, 425 U.S. 820 (1976).[19]

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that certiorari should be granted.

Dated: New York, New York
December 30, 1981

ARTHUR RICHENTHAL
Counsel for Petitioners
122 East 42nd Street
New York, New York 10168
Tel. No. (212) 687-8360

---

[19] This principle has been applied in construing the scope of Congressional waiver of sovereign immunity contained in section 2409a. *Newman* v. *United States*, 504 F.Supp. 1176, 1178 (D.Ariz. 1981); *Mashpee Tribe* v. *New Seaburg Corp.*, 427 F.Supp. 899, 903-04 (D.Mass. 1977), *aff'd*, 592 F.2d 575 (1st Cir. 1979).

Appendix

81-1231

No. 81-....

Office Supreme Court, U.S.
FILED
DEC 31 1981
ALEXANDER L. STEVAS
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

BEDFORD ASSOCIATES, a Partnership, DORIS K. CARVER and SAMUEL ADES, individually and as partners of Bedford Associates, and AMCAR MANAGEMENT CORP.,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent,

—and—

THE BOWERY SAVINGS BANK,

Respondent.

BEDFORD ASSOCIATES, a Partnership, DORIS K. CARVER and SAMUEL ADES, individually and as partners of Bedford Associates,

Petitioners,

v.

THE BOWERY SAVINGS BANK,

Respondent,

—and—

UNITED STATES OF AMERICA,

Respondent.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

ARTHUR RICHENTHAL
Counsel for Petitioners
122 East 42nd Street
New York, New York 10168
Tel. No. (212) 687-8360

DAVID ABRAMS
IRVING M. MOSS
DONALD I. RICHENTHAL
Of Counsel

INDEX

	PAGE
APPENDIX A—Opinion of Court of Appeals	1a
Dissenting Opinion of Judge Moore ..	40a
APPENDIX B—Opinion of United States District Court	47a
APPENDIX C—Opinion of United States District Court on Subject Matter Jurisdiction	85a
APPENDIX D—Order of Court of Appeals	90a
APPENDIX E—Order of Court of Appeals Denying Rehearing and Suggestion for Rehearing *En Banc*	93a
APPENDIX F—Section 7 of the Public Buildings Act of 1959, as amended, 40 U.S.C. § 606 (1980)	95a
APPENDIX G—28 U.S.C. § 2409a Real Property Quiet Title Actions	98a
APPENDIX H—28 U.S.C. § 2410 Actions Affecting Property on Which United States Has Lien	100a

---

Amcar Management Corp., one of the petitioners filing this Appendix to Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit, for its original Designation of Corporate Relationships, states as follows: It has no parent corporation and no subsidiaries. Its sole stockholders are Michael Carver, son of Doris Carver, and his wife. It has no affiliates except that petitioner Bedford Associates, a partnership, may be deemed to be an affiliate.

Appendix A—Opinion of the Court of Appeals.

UNITED STATES of America,
Plaintiff-Appellant,

v.

BEDFORD ASSOCIATES, a Partnership, Doris K. Carver and Samuel Ades, individually and as partners of Bedford Associates, and Amcar Management Corp., Defendants-Appellees,

and

The Bowery Savings Bank,
Intervenor-Appellee.

The BOWERY SAVINGS BANK,
Plaintiff-Appellee,

v.

BEDFORD ASSOCIATES, a Partnership, Doris K. Carver and Samuel Ades, individually and as partners of Bedford Associates, Defendants-Appellees,

and

United States of America,
Defendant-Appellant.
Nos. 267, 377, Dockets 80-6105, 6107.

United States Court of Appeals,
Second Circuit.

Argued Oct. 31, 1980.

Decided March 31, 1981.

Before MOORE, MULLIGAN, and KEARSE, Circuit Judges.

KEARSE, Circuit Judge:

These consolidated appeals, now before us for the second time, require us to determine the rights and liabilities of three parties interested in a 21-story office building

located at 120 Church Street in New York City. Bedford Associates[1] owns the building; The Bowery Savings Bank ("Bowery") holds a consolidated first mortgage on it; and the United States Internal Revenue Service ("IRS") has occupied the building as its Manhattan District Headquarters since shortly after construction in 1962. The lease under which the IRS formerly occupied the building expired on October 31, 1978. The litigation commenced in March 1979, when the government sued Bedford for specific performance of, and damages under, a new lease it contended had been concluded through negotiations between Bedford and the General Services Administration ("GSA"). Bedford denied that these negotiations had produced a valid lease and counterclaimed for damages arising from the government's continued occupancy after the old lease had expired. At about the same time, Bowery brought an action to quiet title to the premises in itself and to foreclose its mortgage against the interests of Bedford and the government. Proceedings in the two actions were later consolidated.

The district court denied the government's motion to dismiss Bowery's foreclosure action, 491 F.Supp. 848 (S.D.N.Y. 1980), and, after a bench trial, entered final judgments denying all relief to the government, awarding substantial damages to Bedford and Bowery, foreclosing Bowery's mortgage against Bedford and the government, and ordering the government to pay rent to Bowery. 491 F.Supp. 851 (S.D.N.Y. 1980). In the present appeal,[2]

---

[1] Bedford Associates is a partnership consisting of the defendants Doris K. Carver and Samuel Ades. The building is operated and maintained by the defendant Amcar Management Corp. ("Amcar"). Bedford Associates, Carver, Ades and Amcar will hereinafter be collectively referred to as "Bedford."

[2] In the first appeal, the government challenged, and we largely affirmed, the terms of a preliminary injunction against certain self-help measures threatened by Bedford. *United States* v. *Bedford Associates*, 618 F.2d 904 (2nd Cir. 1980).

the government renews its contention that the district court lacked jurisdiction to adjudicate Bowery's mortgage foreclosure action and assails the final judgment entered against it. We affirm in part, reverse in part, and remand for further proceedings.

I. Facts and Prior Proceedings

A. The Relations Among the Parties

The relationship between Bedford and the government commenced in 1962, when GSA and Bedford executed the initial lease of 120 Church Street. The 1962 agreement provided for an initial ten year term, commencing November 1, 1963, at an annual rental of $1,949,500. The agreement gave the government two five-year renewal options, with the annual rental set as $2,115,499 during the first renewal term, and at $2,226,194 during the second. The government exercised the first renewal option in 1973, and the IRS occupied the building under the old lease through October 31, 1978. The government did not exercise its second renewal option, and the old lease expired on October 31, 1978.

Relations between Bedford and the government were never perfectly smooth. Bedford periodically complained that it was losing money under the lease; one point of contention was the government's responsibility for certain excess electricity costs, not provided for in the original agreement, that resulted from IRS's increasing use of electrical office machines. The government, for its part, often sought changes in the building's physical plant. Although the parties were able to resolve many of their differences through supplemental agreements amending the lease, their relationship was becoming rather strained toward the end of the first renewal period. Bedford complained that its losses were mounting under the old lease,

while the government had determined that 120 Church Street no longer met the IRS's needs. By early 1977, the government had decided to seek improved space.

In June 1977, GSA solicited several prospective lessors, including Bedford, for offers of appropriate leases. GSA's solicitation called for offers of 317,000 square feet of space on contiguous floors, plus an option on 8000 additional square feet, with the premises to be ready for occupancy by November 1, 1978. By August 15, 1977, when the solicitation period closed, GSA had received three offers, including an offer from Bedford for the 120 Church Street building. Bedford offered 350,000 square feet at an annual rental of $3,073,000, and proposed renovations that it estimated would cost it about $1 million. GSA deemed the proposed renovations insufficient. and the offer was, on its face, for more space than the solicitation requested. The two other offers, however, were also deficient in various respects. By December 1977, GSA had rejected those offers, leaving as its only alternatives Bedford's new offer and the second renewal option under the old lease. The renewal option, for 369,000 square feet at an annual rent of $2,226,194, did not include the renovations needed by IRS.

After extensive negotiations, the rocky progress of which is recounted in detail below and after consideriable delay in processing Bedford's offer, GSA delivered to Bedford, on October 30, 1978, an award letter purporting to accept Bedford's offer, as amended through the negotiations. On December 13, 1978, GSA presented Bedford a proposed lease for execution. Under this lease, Bedford was to be paid rent at the second renewal option rate of $2,226,194 per year until renovations were completed, at which time the rent would rise to $2,902,160 per year. Bedford rejected the proposed lease by letters dated December 15, 1978, claiming that the lease did not conform with the

solicitation and award and pointing out the substantial cost increases that had occurred during the year.

The parties resumed negotiations after Bedford's rejection, but no progress was made. Bedford asserted that its losses had become enormous and that the delay in commencing the proposed renovations had rendered them infeasible. The government paid rent at the second renewal option rate in November and December 1978, and then decided to deduct utilities payments in January and February 1979. On March 8, 1979, Bedford demanded additional rent and utilities payments from the government. Apparently, the government did not respond to this letter. On March 20, 1979, Bedford notified GSA that it would close the building and terminate services to it on March 23, 1979, unless the government paid "a reasonable and fair rent" for its occupancy.

B. The Lawsuits

On March 22, 1979, the government filed suit against Bedford. As interim relief, the government sought a temporary restraining order and preliminary injunction against Bedford's threatened "lockout." For permanent relief, it sought specific performance of the new lease it said had been created through its negotiations with Bedford, including a permanent injunction against interference with its access to the building. The government also sought damages for Bedford's breach of the alleged new lease. Bedford consented to entry of a temporary restraining order against the lockout. Bowery was allowed to intervene in the action.

In the meantime, Bowery's mortgage on the building had fallen into default through Bedford's failure to pay real estate taxes and its failure to pay interest and late charges to Bowery. On March 19, Bowery demanded of Bedford an assignment of rents, and two days later filed

suit against Bedford and the government. Bowery sought a declaratory judgment quieting title to the building, foreclosure of its mortgage against Bedford's and the government's interests, and an assignment of rents.

After an evidentiary hearing, the district court granted the government's motion for a preliminary injunction. The court's decree forbade Bedford to interfere with the government's occupancy of 120 Church Street, ordered the government to pay rent to Bowery at the second renewal option rate, and ordered the government to pay all utilities expenses, without setoff from its rental payments. Dissatisfied with the terms of its victory, the government appealed, arguing principally that the provision of the decree requiring it to bear utilities costs violated principles of sovereign immunity. After concluding that we had jurisdiction of the government's appeal, we affirmed the district court's imposition of the disputed term upon the United States as a condition of awarding equitable relief. We remanded the order, however, for modification of the amount of rent to be paid to Bowery and of the proportion of utilities costs to be borne by the government. *United States v. Bedford Associates,* 618 F.2d 904 (2d Cir. 1980).

Shortly after the preliminary injunction was entered, Bedford filed its answer to the government's complaint. Bedford denied that its negotiations with GSA had produced a lease agreement and, alternatively, argued that any agreement formed was unenforceable on grounds of unconscionability, misrepresentation, and duress. In addition, Bedford counterclaimed against the government for the fair market value rental of the premises. Later, Bedford answered Bowery's complaint in the mortgage foreclosure action, asserting that the court lacked subject matter jurisdiction of the action and that it was barred

by laches, and counterclaiming against Bowery for payments from the rents Bowery was then collecting under the preliminary injunction. In May 1979, the government moved to dismiss Bowery's complaint in the foreclosure action on grounds of lack of subject matter jurisdiction. Eventually, the government answered Bowery's complaint, renewing its contention that subject matter jurisdiction was lacking and raising affirmative defenses of equitable estoppel, waiver, and unclean hands.

On remand after the first appeal, in an opinion and order dated March 18, 1980, the district court denied the government's motion to dismiss Bowery's complaint for lack of subject matter jurisdiction. Rejecting the government's argument that principles of sovereign immunity precluded Bowery's suit against it, the court held that 28 U.S.C. § 2409a (1976) permits the United States to be named as a defendant in actions "to adjudicate a disputed title to real property in which the United States claims an interest," and concluded that the government had thereby waived sovereign immunity as to an action by a mortgagee to foreclosure against the interest of the United States as occupant or lessee.

Shortly thereafter, the district court entered its final judgment and order on the merits. Briefly, the court denied all relief to the government and awarded substantial relief to Bedford and Bowery. Because a thorough understanding of the district court's findings of fact and conclusions of law is essential to our review of the judgment, we set them forth in some detail below.

C. The District Court's Opinion

1. Findings of Fact

The district court made extensive findings of fact concerning the expectations and conduct of the parties during

the negotiations period, focusing on (a) Bedford's expectation that certain terms of the offer could be negotiated, or renegotiated, after the lease had been awarded; (b) the failure of Bedford tand GSA to reach agreement on certain terms of the lease; (c) the oppressive effect of the lease upon Bedford; (d) GSA's conduct during the negotiations; and (e) Bowery's conduct.

a. *Bedford's expectations concerning post-award negotiations.* When GSA initially solicited offers in June 1977, it contemplated that the entire process of negotiating, obtaining congressional approval for,[3] and awarding the lease would be completed by April 1978. Because the term of the lease was not to commence until November 1, 1978, this schedule would have afforded the lessor several months in which to begin work on improvements called for under the solicitation. With this timetable in mind, the solicitation required that offers remain open until April 15, 1978.

As it happened, however, the process became delayed. For reasons unexplained, GSA did not recommend acceptance of Bedford's offer until April 1978, even though its decision to recommend the offer had been reached in November 1977. Not until June 1978 did GSA send to Congress for its approval a final prospectus concerning Bedford's offer. Because of these delays, GSA repeatedly requested Bedford to extend its offer beyond the April 15, 1978 expiration date. Bedford reluctantly granted these extensions, giving the last on September 27, 1978.

This delay sharply reduced the value of the proposed lease to Bedford. As GSA knew, Bedford had initially planned to complete the renovations called for in its bid

---

[3] Congressional approval is required for government leases at rentals in excess of $500,000. 40 U.S.C. § 606(a) (1976). *See also* Part II.A.1. *infra.*

by early 1978. As the delay in approving the lease prevented Bedford from beginning the renovations, their cost increased dramatically. Whereas Bedford's mid-1977 bid had contemplated renovation costs of approximately $1 million, by late 1978 the cost apparently had risen to some $3.8 million. In addition, utilities costs, which Bedford was to pay under the terms of its initial offer, had risen sharply.

Alarmed by these and other cost increases, which threatened it with ruin, Bedford repeatedly protested the delay and, as will be seen, sought to negotiate more favorable terms for several items of the offer. As will also be seen, the terms of some of these items were never finalized. The district curt found that GSA indicated to Bedford, and Bedford reasonably believed, that all or most of these items could be renegotiated after the lease was approved and awarded. The district court also found that Bedford indicated to GSA that it did not intend to be bound by the terms of its offer with respect to the items said to be subject to renegotiation.

b. *Failure to reach agreement on certain terms.* As stated above, the speedy completion of renovations at 120 Church Street was of great concern both to Bedford and to the government. On November 18, 1977, anticipating that many floors of the building would be renovated when the new lease took effect on November 1, 1978, Bedford by letter proposed to GSA that the government pay the rent called for under the second renewal option, on a pro rata basis, for any floors not renovated by November 1, 1978. Soon, however, as the processing of Bedford's offer became delayed and construction costs mounted, the firm realized that renovations could not proceed on schedule and that its November 18, 1977, proposal would not generate adequate rent. On March 2, 1978, Bedford by letter

proposed instead that the government pay the first renewal option rent plus all utilities until the completion of construction or 18 months after the new lease was executed, whichever came first. The district court found that this letter withdrew the November 18, 1977 proposal. GSA decided to reject the March 2 proposal, but it did not immediately so advise Bedford; by letter dated April 5, 1978, it told Bedford that the proposal could be considered after an award was made. Although the new lease actually proffered to Bedford by GSA in late 1978 contained Bedford's November 18, 1977 proposal, the district court found that the parties had never agreed to it.

Another point on which Bedford and GSA never came to terms was the total area to be leased to the government. GSA's solicitation called for 317,000 square feet plus an option on 8000 more. Bedford's initial bid had offered the whole of 120 Church Street, containing, by its measure, 350,024 square feet. During the negotiations period, Bedford reduced the area it offered to 325,000 square feet, the total amount called for by the government's solicitation. As a result of these reductions, Bedford reasonably believed that the IRS would not occupy the whole building, as originally contemplated, and that one or two floors might be available to be leased on favorable terms to another tenant. By late 1977 and early 1978, however, GSA had apparently decided that it wanted the whole building. Because the parties disputed the applicability of a "10% corridor reduction factor,"[4] they were unable to agree on

---

[4] At the time of the negotiations, GSA required that measurements of floor space in office areas be reduced by 10% if the corridor system serving the area failed to "provide ready access to all rooms required." Bedford believed that the reduction factor was not applicable because the government's renovations called for "open landscaping." an arrangement that would not require fixed corridors. GSA responded by advancing the concept of "phantom corridors," *i.e.*, common walkways used to move about the office. GSA later abandoned the 10% reduction factor.

the total footage in the building and hence area to be leased, Bedford believeing that the building contained enough space to accommodate another tenant in addition to IRS, and GSA believing that there was room only for IRS.

The third item on which the parties never agreed was the rate for "overtime" services, *i.e.*, building services and utilities to be furnished by the lessor after normal business hours. The government's solicitation provided that the lessor would furnish such services on request at rates to be agreed upon. Bedford proposed rates for this potentially significant item, but no specific terms were ever reached.

c. *The oppressiveness of the lease.* The district court found that Bedford's August 1977 offer was made in good faith and was economically viable when made. However, as a result of GSA's delay in processing Bedford's offer and the increases in construction and utilities costs, the offer became uneconomical sometime early in 1978. The government's adoption of Bedford's November 18, 1977 proposal concerning rent during the renovations period, which the court found that Bedford had withdrawn in its March 2, 1978, letter, further diminished Bedford's return under the new lease. GSA was well aware of the harsh effect of the new lease upon Bedford. The rental fixed under the new lease, about $9.16 per square foot, was substantially below both GSA's appraised fair annual rental of $11.86 per square foot and its standard level user's charge[5] of $13.00 per square foot. In January 1979, when GSA was insisting that Bedford perform according to the new lease, a GSA audit estimated that Bedford would lose some $521,616 annually if it did perform.

---

[5] The standard level user's charge is the rate GSA charges the agency that actually occupies the leased premises.

d. *GSA's conduct*—(i) *Misrepresentations concerning Bedford's competition.* Bedford initially offered 350,024 square feet at an annual rent of $3,073,210.72, or about $8.78 per square foot, with electricity costs included in the rent. The two other offers submitted to GSA called for substantially higher rents—$14.41 per square foot in one case, and $12.07 per square foot in the other—and neither included electricity. Given these substantial cost differentials, the other offers were not competitive with Bedford's offer. Despite the apparent superiority of Bedford's offer, GSA repeatedly represented to Bedford that its offer was not competitive with the others. Even after GSA had decided, unbeknownst to Bedford, to reject the other offers, and despite a provision in the bid solicitation assuring that bids would be kept confidential, GSA disclosed to Bedford certain portions of the rejected offers and represented to Bedford that its offer was not competitive with them. Through these misrepresentations concerning the extent of Bedford's competition, GSA extracted substantial concessions from Bedford that further diminished the value of the lease to Bedford.

(ii) *Threats to exercise the second renewal option.* GSA also exerted pressure on Bedford through repeated threats to exercise the second renewal option under the old lease. Under that lease as originally drafted, the second option was to expire if notice of intent to renew were not given 180 days before the first renewal expired. GSA believed, however, that a reduction of the notice period to 30 days negotiated for the first renewal option in 1973 also applied to the second option. Thus, GSA requested a waiver of the notice requirement in September 1978. Bedford, although believing that the government's right to renew had expired, ultimately granted the waiver in order to avoid litigation and on the understanding that the government would not exercise the second option if the new lease were

approved. As early as November 1977, both GSA and Bedford knew that exercising the second option would bring ruin to Bedford, forcing it to sell the building. Indeed, GSA estimated that Bedford would lose more than $600,000 annually under the option. Moreover, GSA knew that it could not in fact exercise the option, for IRS could not function effectively at 120 Church Street without renovations and improvements. Despite its knowledge, GSA repeatedly told Bedford that it might exercise the option unless Bedford made further concessions.

e. *Bowery's conduct.* The district court found that Bowery's role during the negotiations was primarily that of anxious spectator. Bowery's mortgage, as amended in 1975, required Bowery's approval of any new lease of the premises. Although Bowery never received a complete copy of Bedford's initial offer, it knew enough by September 1978 to conclude, on a preliminary basis, that the lease as then proposed would be unacceptable to Bowery. Nonetheless, the district court found that Bowery, like Bedford, believed that any award made as a result of Bedford's offer would not be binding with respect to certain apparently open terms, but would merely serve as starting point for post-award negotiations. In particular, Bowery understood that the area to be leased and the responsibilitiy for utilities costs were subject to further negotiations, and it reasonably believed that the lease might be profitable if favorable terms were reached.

2. Conclusions of Law.

The district court's conclusions of law flowed directly from the findings of fact stated above. In the government's action against Bedford, the court held that the negotiations between Bedford and GSA had failed to produce an agreement because (1) Bedford had indicated to GSA that it did not intend to be bound by its original

offer (see 1.a. above); and (2) certain essential terms of the agreement were never finalized by the parties (see 1.b. above). Thus, in the district court's view, the parties had not rached the "meeting of the minds" essential to formation of a contract. Alternatively, the court held that any contract formed between Bedford and the government was unconscionable, and therefore unenforceable, because (1) the terms of the agreement oppressively favored the government (see 1.c. above); and (2) GSA agents had engaged in misconduct, tantamount to misrepresentation and duress, in negotiating the agreement (see 1.d. above). Accordingly, the court dismissed the government's action for specific performance of, and damages under, the new lease and awarded Bedford damages on its counterclaim for the government's occupancy of 120 Church Street after expiration of the old lease on October 31, 1978.

In Bowery's action against Bedford and the government, having found Bedford's mortgage in default, the court declared that Bowery's mortgage had priority over the government's tenancy, foreclosed the mortgage against both defendants, and ordered the government to pay to Bowery, commencing June 1, 1980, the fair market value rental as of that date for continued occupancy of the premises. The court rejected the government's contentions that Bowery had behaved inequitably, and was therefore not entitled to the equitable remedy of foreclosure, because it had allegedly concealed from GSA its intention to disapprove the new lease, thus leading the government to permit the second renewal option to expire. The court concluded that Bowery had not decided to disapprove the lease, but was awaiting the outcome of post-award negotiations before reaching a decision (see 1.e. above), and that its conduct was therefore innocent. Finally, the court reaffirmed its ruling that 28 U.S.C. § 2409a provided subject matter jurisdiction to adjudicate Bowery's mortgage foreclosure action.

The court determined that the annual fair market rental of the building as of the date of trial was $4,533,350, without offset for utilities, and, giving recognition to the assignment of rents to Bowery under the preliminary injunction, it entered a final judgment, fixing the rights and liabilities of the parties. The judgment, in pertinent part, (1) granted foreclosure of the mortgage as requested by Bowery, and quieted title to the building in Bowery; (2) declared that since November 1, 1978, the United States had no contractual right, title or interest in the building other than as a holdover tenant, and that the United States' tenancy was subordinate Bowery's mortgage; (3) awarded Bedford damages against the government in the amount of $462,507.33, plus interest and costs, representing the excess of fair market rental over the amounts paid by the government to Bedford from November 1978 through February 1979; (4) awarded Bowery damages against the government in the amount of $1,252,673.96, plus interest and costs, representing the excess of fair market value over the amounts paid by the government to Bowery from March 1979 through May 1980; and (5) ordered the government to pay rent to Bowery at an annual rate of $4,533,350, without offset for utilities, for continued occupancy of the building after June 1, 1980.

D. The Government's Contentions on Appeal

The government assails the district court's conclusion that negotiations between Bedford and GSA did not produce an enforceable lease. With respect to the conclusion that the parties' failure to agree on certain terms precluded formation of a contract, the government argues that the court's findings of fact concerning these open terms were clearly erroneous, and that as a matter of law these terms were not so essential as to preclude agreement. With respect to the court's conclusion that the lease was unconscionable, the government again attacks

the findings of fact, and argues that as a matter of law neither GSA's conduct nor the terms of the agreement barred its enforcement as written. In addition, the government contends that the district court lacked jurisdiction to award Bedford damages on its counterclaim, and that Bedford can obtain damages only in the Court of Claims.

In its appeal from the judgment against it in Bowery's suit, the government renews its contention that 28 U.S.C. § 2409a does not confer jurisdiction of a mortgage foreclosure action. Briefly, the government contends that § 2409a confers jurisdiction only of quiet-title actions, not of foreclosure actions, and that the sole waiver of sovereign immunity with respect to foreclosure actions is found in 28 U.S.C. § 2410, which permits suit against the United States in foreclosure proceedings if the government asserts a lien on or security interest in the premises. Because the government does not claim a lien or security interest respecting 120 Church Street, it asserts that §§ 2409a and 2410 leave Bowery powerless to foreclose against it. In addition, the government contends that as to the fairness of Bowery's conduct during the negotiations period the district court's findings were clearly erroneous. Finally, the government contends that even if Bowery's action is not completely barred, the district court erred in using the fair rental value of 120 Church Street as of the date of trial rather than November 1, 1978, when the old lease expired, and that the court wrongly denied the government its right, under 28 U.S.C. § 2409a to elect to vacate or to condemn the premises, rather than to continue occupancy at the fair rental value.

[1, 2] Although we conclude that most of the district court's findings of fact were not clearly erroneous, we nevertheless agree with the government that its negotiations with Bedford produced an enforceable lease. We

therefore vacate so much of the district court's order as dismissed the government's action for damages under the lease and reverse its award of damages to Bedford. We conclude, however, that the district court acted within its discretion in denying specific performance of the lease, and declaring, therefore, that after November 1, 1978 the government had no right to occupy the premises except as a holdover tenant. Accordingly, we affirm the judgment insofar as it denied equitable relief to the government, and we remand the matter for trial of the government's action for damages.

[3] In Bowery's action, we hold that 28 U.S.C. § 2409a permits Bowery to seek foreclosure here against the United States. Because we cannot say that the district court clearly erred in its factual findings concerning Bowery's conduct, we affirm the judgment below insofar as it foreclosed the mortgage, quieted title in Bowery, and ordered an assignment of rents. However, in keeping with our holding that the government's lease was valid and enforceable, we remand the matter for reduction of the rent due Bowery to reflect the rent due under the new lease.

II. The Government's Lease

A. The Existence of an Agreement

In holding that Bedford and GSA had not established a contract for the lease of 120 Church Street, the district court relied on two related principles of general contract law. First, negotiations and preliminary agreements do not establish a contract if one party manifests to the other intent not to be bound by the agreement until other terms are agreed upon or until the entire agreement has been reduced to writing. Restatement (Second) of Con-

tracts § 25, (tent. draft no. 1 1964); *id.* § 26, Comment b. Second, a contract is not formed if its essential terms remain indefinite. *Brookhaven Housing Coalition v. Solomon,* 583 F.2d 584, (2d Cir. 1978); *Interocean Shipping Co. v. National Shipping & Trading Corp.,* 462 F.2d 673, 676-77 (2d Cir. 1972). Applying these principles, the district court concluded that the Bedford-GSA negotiations did not establish a contract (1) because Bedford had indicated to GSA that it did not intend to be bound by its initial offer until certain terms were agreed upon; and (2) because those terms were essential to the agreement and remained open. We disagree on both points and hold that the negotiations formed a contract.

1. *Bedford's intent not to be bound.* We assume the correctness of the district court's explicit findings that "Bedford clearly did not intend to be bound [by its offer] until the outstanding items had been resolved" and that "Bedford's intent not to be bound and its belief that terms would be renegotiated after an award was made were manifested to the Government," 491 F.Supp. at 863. Similarly, we accept, as a matter of general contract law, the proposition that negotiations cannot form a contract if one party to them indicates to the other his intention not to be bound until some later time. Bedford, however, was not an ordinary commercial landlord: it sought its rents from public funds. Viewed against the statutes and regulations applicable to the procurement of government leases, Bedford's conduct in repeatedly extending the life of its offer precluded a holding that GSA's award of the lease to Bedford could not create a contract.

Federal policy favors purchase, rather than leasing, of property, on the ground that ownership is more economical in the long run. *See, e.g.,* H.R.Rep.No. 94-1584 (pt. 1), 94th Cong., 2d Sess. 2 (1976), *reprinted in* [1976] U.S.

Appendix A

Code Cong. & Ad.News 5558, 5559 (accompanying 1976 amendments to Public Buildings Act of 1959). Although Congress has long recognized that leasing is necessary in some circumstances, it has mandated certain standards and procedures to be applied to proposed government leases in order to ensure that they are truly advantageous to the United States. Thus, the Economy Act of 1932, 40 U.S.C. § 278a (1976), forbids GSA to recommend a lease if the annual rental under it exceeds 15% of the fair market value of the property. And § 7(a) of the Public Buildings Act of 1959, 40 U.S.C. § 606(a)(1976), requires GSA to submit proposed leases requiring an annual rent in excess of $500,000 to the Public Works Committees of both Houses of Congress for their approval. Thus, the Economy Act ensures that the government will not agree to excessive rentals, while the Public Buildings Act permits Congress to review the overall propriety of major leases.

GSA has adopted various procedures to carry out these congressional mandates. In its usual solicitation of offers of major leases, it requires that prospective lessors hold their offers open for a certain period, during which GSA can negotiate needed changes and determine which offer to recommend. Pursuant to § 7(a) of the Public Buildings Act, it then prepares and submits to Congress a prospectus concerning the offer recommended for acceptance; the prospectus describes, *inter alia,* the space to beleased and "the maximum cost" of the lease to the United States. GSA delivers the United States' unconditional acceptance of an offer once Congress has approved it.

As a lessor to the government since 1962, Bedford was undoubtedly familiar with these procedures.[6] Under GSA's June 1977 solicitation, Bedford's August 15 offer

---

[6] We would charge Bedford with knowledge of these federal laws even if it were not in fact aware of them.

was to remain open until April 15, 1978. As the district court found, Bedford knew by March 2, 1978, that its initial offer, as modified, would prove uneconomical for it. Nonetheless, and regardless of the fact that GSA had by then become intransigent about further modifications of the offer to be submitted to Congress and had so notified Bedford on April 5, 1978, Bedford extended the life of its offer on no fewer than seven occasions from February 28, 1978 to September 27, 1978. In view of Bedford's manifest willingness to permit GSA to go forward with the approval process—a process that Bedford should have known would lead to acceptance of its offer—Bedford cannot now be heard to say that its offer was incapable of acceptance. To uphold such a claim, as the district court did, would permit lessors such as Bedford, and indeed GSA itself, to evade statutory limitations on the procurement process and to frustrate Congress's supervision of that process. Accordingly, as a matter of federal law and regardless of the status of the bargain under general contract law,[7] we hold that Bedford's extension of its

---

[7] This court undoubtedly has power to apply federal law in disputes between the United States and its lessors. As the Supreme Court has stated. "[F]ederal law governs questions involving the rights of the United States arising under nationwide federal programs." *United States* v. *Kimbell Foods, Inc.*, 440 U.S. 715, 726, 99 S.Ct. 1448, 1457, 59 L.Ed.2d 711 (1979). *See generally Clearfield Trust Co.* v. *United States*, 318 U.S. 363, 63 S.Ct. 573, 87 L.Ed. 838 (1943). Moreover, in the setting of the present case, we have ample power to construct rules of federal common law that may vary from the principles of general contract law. Although federal law frequently incorporates state law when there is little need for uniform nationa rues. *see Kimbell Foods, supra; United States* v. *Little Lake Misere Land Co.*, 412 U.S. 580, 93 S.Ct. 2389, 37 L.Ed.2d 187 (1973), the role of Congress under the Economy Act and the Public Buildings Act convincingly demonstrates the need for a uniform approach to contract forma-

(footnote continued on following page)

offer empowered GSA to accept that offer, and that GSA's delivery of the award letter on October 30, 1978, created a valid contract.

We reach this conclusion even though GSA may have known that Bedford believed that its offer was not binding and that further negotiations would follow the award. GSA was not at liberty to present to Congress merely a bundle of "suggestions" concerning 120 Church Street, disguised, in the trappings of a formal prospectus, as a definite offer respecting the premises. Moreover, given the federal statutes and regulations that circumscribed GSA's actions in this matter and Bedford's status as a substantial commerical entity and longtime government lessor, any belief on Bedford's part that GSA would violate its congressional mandate was unreasonable as a matter of law. As for the prospect of further negotiations, we think this raises at most a possibility that Bedford and GSA "agreed to agree" upon troublesome terms at a later time. As discussed above, we cannot suppose that Bedford and GSA meant to renegotiate the lease *in toto* after Congress had approved it. The parties' willingness to conduct post-award negotiations therefore does not preclude the existence of an agreement in the meantime.

2. *The effect of the open terms.* In holding that there was no "meeting of the minds" and therefore no contract, the district court also relied on the parties' inability to

---

(footnote continued from preceding page)

tion issues in disputes concerning government leases. Congress cannot adequately evaluate the leases submitted for its approval if their validity and terms are subject to varying rules of local law. Because the application of local law would frustrate the strong federal interests in economy and congressional supervision, we must "fashion special rules [of federal common law] solicitous of those federal interests." *Kimbell Foods, supra,* 440 U.S. at 728, 99 S.Ct. at 1458 (footnote omitted).

agree on the rent to be paid during the renovations, the area to be leased, and the rate for overtime services. In the court's view, the existence of these disputed terms rendered the proposed lease substantially indefinite and therefore void. We disagree. Neither the terms themselves nor the aesserted disagreements concerning them were so significant as to preclude enforcement of the parties' bargain.

An agreement need not spell out all details of the bargain in order to be enforceable. Even if the parties have left some terms of their agreement indefinite, a court may enforce the agreement if it has means of giving content to the indefinite terms, *see, e.g., Lee v. Joseph E. Seagram & Sons, Inc.*, 552 F.2d 447, 453-54 (2d Cir. 1977); 1 Corbin on Contracts § 97, at 426 (1963), or if those terms are not material to the bargain, *see, e.g., United States v. City of New York*, 131 F.2d 909, 915 (2d Cir. 1942), *cert. denied*, 318 U.S. 781, 63 S.Ct. 858, 87 L.Ed. 1149 (1943). The district court erred in failing to apply these principles to Bedford's agreement with the government.

We begin with the parties' apparent inability to agree on the square footage to be leased. The district court found that Bedford and GSA had disputed the applicability of the "10% corridor reduction factor" and concluded that they had not agreed on the dimensions of the space to be leased. There were adequate means for resolving this disagreement. GSA's solicitation, which was part of the submission to Congress and became part of the agreement upon the government's acceptance of Bedford's offer, provided that the dispositive measurement of the leased space was to be a mutual field measurement after delivery of the space and that any disagreement would be resolved through administrative proceedings. These modes of resolving the dispute were eminently practicable, and the district court should have remitted

the parties to them. *See generally* 1 Corbin on Contracts, *supra,* § 98 at 433-38. In addition, the total area in dispute—about 5% of the leased space[8]—was relatively insignificant. Thus the uncertainty concerning this term was not so great as to preclude enforcement of the agreement.

Similarly, the rate for overtime services was susceptible of resolution and was a relatively small part of the bargain. Bedford and GSA had frequently negotiated agreements concerning such "extra" charges in the past, and the court could have reviewed this prior course of dealing, as well as standard practices in the industry, to set a reasonable rate. *See Lee v. Joseph E. Seagram & Sons, Inc., supra.* In addition, even if we accept the district court's finding that overtime charges might be as high as $90,000 annually under the new lease,[9] that amount is comparatively insignificant in view of the annual rental of some $2.9 million.

Finally, we turn to the problem of the rent to be paid during renovations. The district court found that Bedford had withdrawn its November 18, 1977, proposal, calling for payment of the second renewal option rent on a pro rata basis for unrenovated floors, by means of its March 2, 1978, letter, which proposed that the government instead pay the first renewal option rent plus all utilities. The government attacks this finding as clearly erroneous,

---

[8] GSA believed that the building contained about 295,000 net usable square feet of office space under its measuring criteria; Bedford contended that it contained about 312,000. Apparently, the parties agreed that the building contained 35,000 square feet of storage space. The disparity between their estimates, about 17,000 square feet, was roughly 5% of the total area.

[9] The government disputes this estimate, which was based on overtime costs under the old lease, on the grounds that the new lease defined overtime differently, and that no "overtime," as thus defined, would have been used under it. We leave the matter for determination on remand.

and argues that, as a matter of law, Bedford could not withdraw its November 1977 proposal without GSA's consent while its offer was held open. For its part, Bedford contends that it was free to withdraw the November 1977 proposal at any time, that it did so through its March 1978 proposal, and that GSA's failure to adopt the latter proposal rendered the term indefinite. We think that Bedford must be held to the terms of its November 1977 proposal, and that the agreement was therefore definite.

Were this an ordinary commercial case involving private parties, we would very likely uphold the district court on this point. Although Bedford's offer provided that it would remain open for a specified time, nothing in the record indicates that the government gave any consideration for this feature of the offer or took any action, beyond negotiating with Bedford, in reliance on it. In the ordinary commercial setting, therefore, no option contract would have been formed, and Bedford would have remained free to withdraw its offer at any time. *See generally* Restatement (Second) of Contracts §§ 35, 41, 35A, 45 (tent. draft no. 1, 1964); 1 Corbin on Contracts, *supra*, §§ 38, 43; 1 Williston on Contracts §§ 55, 61, 61A (3d ed. 1957). In these circumstances, Bedford's March 1978 proposal might have sufficed to withdraw the November 1977 proposal, for it would at least have suggested to the government that Bedford no longer meant to be bound by the earlier proposal.[10] Because GSA never

---

[10] The effect of a modification of an outstanding offer seems to be an uncertain point of general contract law. Although one leading commentator states that "[a]ny communicated change in the terms of an offer operates as a revocation of that offer" in its entirety, rather than of the affected terms alone, 1 Corbin on Contracts, *supra*, § 39 at 164 (footnote omitted), there is relatively little case authority for this principle, and at least one court of appeals has declined to apply it as a rigid rule of general federal contract law. *United Steelworkers* v. *Bell Foundry Co.*, 626 F.2d 139 (9th Cir. 1980).

acceded to the March 1978 proposal, the term would have remained indefinite. The term was significant, and its indefiniteness might well have compelled the conclusion that the parties had not formed a contract.

In the realm of government leases, however, things are necessarily otherwise. Unlike an ordinary commercial contractor, and indeed unlike an ordinary government contractor, a prospective lessor to the government may be required to hold his offer open for a reasonable period of time even in the absence of an option contract. In general, GSA's Federal Procurement Regulations (FPR) specify that solicitations for offers must permit withdrawal of offers at any time prior to award. 41 C.F.R. §§ 1-3.802-1(a), 1-3.802-2(a) (1979). These regulations, however, are aimed primarily at contracts for the purchase of goods and services, and by their terms they apply to leases of real property "only to the extent explicitly stated in specific FPR provisions." *Id.* § 1-1.004-1.[11] The FPR regulations governing withdrawals of offers do not mention leases, *see id.* §§ 1-3.802-1, 1-3.802-2, and GSA regulations governing leasing procedures do not address withdrawals of offers, *see* 41 C.F.R. §§ 101-18.100 to 18.107 (1980). GSA's practice is to require that offers be held

---

[11] FPR § 1-1.004-1 also undercuts Bedford's argument that GSA could not accept the November 1977 proposal because it had never given notice of termination of negotiations as required under 41 C.F.R. § 1-3.805-1(b) (1979). The latter section does not refer to leases and therefore, under § 1-1.004-1, does not govern the leasing process. Although GSA's leasing manual does call for the use of a notice procedure for terminating leasing negotiations, *see* GSA, Acquisition of Leasehold Interests in Real Property. A GSA Handbook ch. 3-18 at 24 (various dates), that manual does not have the binding effect of duly promulgated regulations and in any event it plainly contemplates that negotiations may continue even after the formal termination date. Although it would have been helpful if GSA had formlly notified Bedford that negotiations would soon end, we see nothing unlawful in its failure to do so.

open long enough to permit the agency and Congress to conduct the review required under the Economy Act and the Public Buildings Act, *see* GSA, Acquisition of Leasehold Interests in Real Property: A GSA Handbook ch. 2-9 at 6 (various dates), and this practice has ample warrant in federal law. Congress and the agency could hardly review offers of leases in the manner required by statute if offerors were free to withdraw or alter their offers at will. Accordingly, when a solicitation for offers requires that offers remain open for a specified period, we will enforce that requirement as a matter of federal common law. *See* note 7, *supra*. *Cf. United States* v. *Sunshine Dairy, Inc.*, 215 F.2d 879 (9th Cir. 1954); *United States* v. *Lipman*, 122 F.Supp. 284 (E.D.Pa. 1954). For so long as an offeror holds his offer open in compliance with GSA's reasonable requirements, he may not withdraw or modify the offer without GSA's consent.

Under these principles, the clause of GSA's June 1977 solicitation requiring Bedford to hold its offer open until April 15, 1978, was fully effective. Bedford was not free to alter or withdraw the offer unilaterally, so long as it was held open. Acoordingly, as a matter of federal law, the March 1978 proposal, to which GSA did not assent, was ineffective to withdraw the November 1977 proposal, which GSA had adopted. The latter proposal remained in the offer and was validly accepted upon delivery of the award. The term concerning rent during renovations was therefore fixed as that set forth in Bedford's November 1977 proposal, and it was not indefinite. In sum, we hold that the lease agreement was not void for indefiniteness.

B. The Enforceability of the Agreement

The district court concluded that even if Bedford and the government had formed a contract, that contract was unenforceable because its terms, and GSA's conduct in

negotiating it, were unconscionable. We do not think that either the terms of the lease or GSA's bargaining methods were so impresive as to preclude enforcement of the agreement in a suit for damages. Nonetheless, recognizing that specific performance is an equitable remedy and that GSA's conduct may not have met equity's exacting standards, we reverse the judgment below insofar as it denied damages to the government, and we affirm the district court's denial of specific performance as a proper exercise of its discretion.

The doctine of unconscionability protects against unfair bargains and unfar practices. *See generally Williams* v. *Walker-Thomas Furniture Co.*, 350 F.2d 445 (D.C.Cir. 1965); *Geldedmann* N *Co.* v. *Lane Processing, Inc.*, 527 F.2d 571 (8th Cir. 1975). Unconscionability is determined by reference to the relative benefit of the bargain to the parties at the time of its making, the nature of the methods employed in negotiating it, and the relative bargaining power of the parties. *Williams, supra; Geldermann, supra;* 1 Corbin on Contracts, *supra*, § 128. We may assume the applicability of the doctrine to government leases of real property,[12] and further assume the correctness of the factual findings on which the district

---

[12] In holding that the lease was unconscionable, the district court relied upon standards developed under U.C.C. § 2-302, which applies to the sale of goods, and under N.Y. Real Prop. Law § 235-c (McKinney Supp. 1980-1981), which applies to leases. 491 F.Supp. at 864. Although the Court of Claims has applied the doctrine in cases concerning government contracts for the sale of goods, *see Fraass Surgical Mfg. Co.* v. *United States*, 571 F.2d 34 (Ct.Cl. 1978), it has not exlicitly adopted it with respect to leases, and there may be some question as to whether the standards applicable to sales should apply to leases in the absence of a statute. *Cf.* Berger, *Hard Leases Make Bad Law*, 74 Colum.L.Rev. 791, 806-13 (1974). Nonetheless, given the generally favorable judicial reception of the doctrine, we feel warranted in assuming that it applies to government leases and that the appropriate standard is that developed under U.C.C. § 2-302.

court based its conclusion of unconscionability. Nonetheless, we conclude that the doctrine should not have been applied in the instant case.

First, we reject out of hand the proposition that the new lease was so onesided as to be unconscionable. Bedford was to receive nearly $3 million annually once renovations were completed. Over the possible 20-year life of the lease, it would have received well over $60 million. The fact that Bedford might lose substantial sums and suffer foreclosure even at these rates does not render its bargain unenforceable. The law does not guarantee a profit. "Absent some violation of law or transgression of a strong public policy, the parties to a contract are basically free to make whatever agreement they wish, no matter how unwise it might appear to a third party." *Rowe* v. *Great Atlantic & Pacific Tea Co.*, 46 N.Y.2d 62, 67-68, 412 N.Y.S. 2d 827, 385 N.E.2d 566 (1978). To this, we would add that the parties are free to contract as they wish even if they perceive the unwisdom of the bargain for one of them, absent a disparity more shocking than that found here.

Similarly, we do not think that the government's conduct during the negotiations period rendered the agreement unconscionable. Significantly, the district court did not make any findings concerning customary practices in real estate transactions generally or in government transactions. To that extent, therefore, it did not apply the proper legal standard. The doctrine of unconscionability condemns specific bargains and bargaining techniques only if they are grossly unfair "according to the mores and business practises of the time and place." *Geldermann, supra,* 527 F.2d at 576, and *Williams, supra,* 350 F.2d at 450, both quoting 1 Corbin on Contracts, *supra,* § 128 at 551. Moreover, while the government should conduct itself equitably in all matters, and while GSA's conduct may have fallen somewhat short here, we do not view the

practices engaged in as unconscionable under any reasonable standard. In reaching its contrary conclusion, the district court relied on its findings that GSA had misrepresented to Bedford that the lease could be renegotiated after an award was made, that it had wrongfully threatened to exercise the second renewal option, and that it had misrepresented the extent of Bedford's competition. The first of these points is inadmissible; as we noted above, Bedford must be charged with knowledge of the fact that any award in its favor would create a binding contract. While there may have been an agreement to agree later on additions or modifications, this did not prevent the formation of a contract upon the government's acceptance of Bedford's bid. The second point is also unsound. As the district court found, Bedford and GSA disputed the availability of the second renewal options after April 1978. The government's "threat" to exercise what it believed to be its legal right was scarcely conduct that was egregious.[13] Finally, although GSA's statements concerning Bedford's competition may have gone beyond "hard bargaining in the in-

---

[13] Although the district court found that the reduction of the notice period for the first renewal option did not affect the notice period for the second, this finding does not alter our analysis. The court also found that GSA believed to the contrary. There was evident room for disagreement on this point, and we cannot say that the government overstepped proper boundaries in dealing with Bedford by threatening to exercise what it thought was a present legal right. *Laemmar* v. *J. Walter Thompson Co.* 435 F.2d 680 (7th Cir. 1970), which characterized as duress an employer's threat to discharge its employees unless they sold certain stockholdings to the company, does not suggest a contrary result. Bedford was not a hapless worker threatened with loss of his job. It was a substantial commercial entity, well able to defend its interests in court, as this litigation amply shows. As the district court found, Bedford granted the reduction of the notice period, thereby effectively acceding to the government's view of things, in order to avoid troublesome litigation. That was a rational business decision. It was not made under duress.

terest of the Government," *Johnson, Drake x Piper, Inc.* v. *United States,* 531 F.2d 1037, 1043 (Ct.Cl. 1976), they were hardly enough, standing alone, to invalidate the entire transaction.

Our convictions in this regard are strengthened by our appraisal of the parties' status. The doctrine of unconscionability seeks to redress the inequities that sometimes result when superior commercial sophistication is brought to bear in a situation of grossly unequal bargaining power. *See Geldermann, supra; Williams, supra;* U.C.C. § 2-302, Comment 1. The substance and sophistication of the party seeking to avoid an agreement on grounds of unconscionability are therefore highly relevant to the judicial inquiry Bedford's means and expertise were substantial. It owned an office building that was appraised at some $12.6 million, as well as several commercial properties. It was a longtime lessor to the government, and it was advised by counsel at every step of the way. Although the government's economic power was undoubtedly far superior to Bedford's, Bedford's ability to negotiate numerous changes in its offer prior to the award indicates that the disparity was not crushing. In short, Bedford was not the sort of entity that "could be easily deceived or taken advantage of," *Geldermann, supra,* 527 F.2d at 576, and we decline to extend for it the safety net of unconscionability.

Nonetheless, we affirm the judgment of the district court insofar as it denied specific performance to the government. Specific performance is an equitable remedy, committed to the district court's sound discretion As an equitable remedy, it may be denied to a party whose own conduct is inequitable *See generally* 5A Corbin on Contracts § 1167 (1964) This is so even though the plaintiff's conduct was not so egregious as to constitute a defense in law For example, specific performance may be denied on grounds of misrepresentation even if the misrepresentation was innocent or if the other party did not rely on it.

See id. § 1167, at 238-241. In light of the district court's conclusion that the contract was unconscionable, and particularly in light of its specific findings that GSA sometimes dealt with Bedford in bad faith, we have no doubt that the court would have declined to order specific performance of the new lease even if it had taken the view of the applicable law set forth above. Had the district court don so, it would have been well within its discretion. Because no useful purpose would be served by remanding the matter to the district court for the exercise of its discretion,[14] we reverse the judgment insofar as it dismissed the government's action for damages, and we affirm it insofar as it denied specific performance.

III. Bowery's Mortgage

It is undisputed on this appeal that Bowery's mortgage on 120 Church Street was valid and was in default, and Bedford has not appealed the judgment of foreclosure. Thus, the only questions for our decision are whether the district court had jurisdiction to foreclose the mortgage against the leasehold interest of the United States[15] and, if it did, whether Bowery's conduct nonetheless precluded a judgment in its favor. We conclude that Bowery was entitled to its remedy on both points, and we affirm the judgment of the district court insofar as it foreclosed the mortgage, quieted title in Bowery, and ordered an assignment of rents.

---

[14] At oral argument, the government appeared to concede that it would not be necessary to remand for the exercise of the district court's discertion on the matter of remedy.

[15] The district court held that it had pendent jurisdiction of Bowery's action against Bedford. That ruling is not challenged here.

Appendix A

A. Jurisdiction

Bowery contends that 28 U.S.C. § 2409a confers subject matter jurisdiction of an action to foreclose a mortgage against the interest of the United States as lessee. The government contends that it does not, and the Bowery's action is therefore barred by the doctrine of sovereign immunity. *Cf. Dugan* v. *Rank*, 372 U.S. 609, 83 S.Ct. 999, 10 L.Ed.2d 15 (1963); *Larson* v. *Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 69 S.Ct. 1457, 93 L.Ed. 1628 (1949) (sovereign immunity generally bars specific relief against the United States). We agree with the conclusion of the district court that § 2409a provides the necessary waiver of sovereign immunity.

Section 2409a provides in pertinent part as follows:

> § 2409a. Real property quiet title actions
>
> (a) The United States may be named as a party defendant in a civil action under this section to adjudicate a disputed title to real property in which the United States claims an interest, other than a security interest or water rights. This section does not . . . apply to or affect actions which may be or could have been brought under sections 1346, . . . or 2410 of this title . . . .
>
> (b) The United States shall not be disturbed in posssession or control of any real property involved in any action under this section pending a final judgment or decree, the conclusion of any appeal therefrom, and sixty days; and if the final determination shall be adverse to the United States, the United States nevertheless may retain such possession or control of the real property or of any part thereof as it may elect, upon payment to the person determined to be entitled thereto of an amount which upon

> such election the district court in the same action shall determine to be just compensation for such possesion or control.
>
> (c) The complaint shall set forth with particularity the nature of the right, title, or interest which the plaintiff claims in the real property, the circumstances under which it was acquired, and the right, title, or interest claimed by the United States.

The government argues that the statute is, by its terms, limited to actions "to adjudicate a disputed title," and that Bowery's action is not maintainable under the statute because the title to 120 Church Street is not in dispute.

The district court rejected this argument on the basis of its reading of Bowery's complaint and the status of the claims alleged in the complaint under local property law. Bowery's first cause of action sought a declaratory judgment to the effect that the government's lease was invalid and that even if the lease were not invalid, it was subordinate to Bowery's mortgage. The district court reasoned that even apart from Bowery's second cause of action, which the parties have characterized as a "garden variety" foreclosure action, the first cause of action sought to remove a cloud from the title to the property by obtaining an adjudication of the parties' rights. Given this "quiet title" purpose, the court concluded that § 2409a permitted the action. In addition, recognizing that state law would necessarily supply the rule of decision for many issues under § 2409a, the district court held that Bowery's action could proceed under § 2409a because it would be characterized as a "quiet title" action under applicable state law.

While the government's lease undoubtedly affected Bowery's ability to convey good title to 120 Church Street as long as the relative priorities of lease and mortgage

remained undetermined, the district court's analysis of Bowery's complaint does not fully explain why § 2409a permitted the court to go beyond an adjudication of priorities and order foreclosure against the government. In addition, while we agree that state law will be dispositive in determining many issues under § 2409a,[16] we do not think that the state law characterization of a particular cause of action will determine the scope of § 2409a. The meaning of the phrase "adjudicate a disputed title" presents a federal question, the answer to which must be sought in federal law. Accordingly, we must squarely confront that question and determine whether § 2409a permits a mortgage foreclosure action to proceed against a leasehold interest of the United States.

The language and history of the statute persuade us that it does. First, the statutory language casts a wide jurisdictional net. Although the caption of § 2409a refers to "quiet title actions," the statute itself plainly permits a variety of suits besides the typical title action, in which adverse claimants to real property seek an adjudication of title as between themselves. Under § 2409a, the dispute need not present a question of title *as to the United States*. Rather, the "disputed title" question must involve "property in which the United States claims an interest." The reference in § 2409a(c) to the "right, title or interest" of the United States confirms the impression that the interest asserted by the government need not be a "title" or ownership interest. Rather, § 2409a permits the government to be named as a defendant whenever it claims an interest in real property that is "adverse," § 2409a(d),

---

[16] Congress intended that state law govern many issues in actions under § 2409a. *See* Letter from Attorney General to Speaker of the House, accompanying H.R. Rep. No. 92-1559, 92d Cong., 2d Sess. 10 (1972). *reprinted in* [1972] U.S. Code Cong. & Ad. News 4547, 4554, 4555. *Cf. United States* v. *Kimbell Foods, Inc.*, 440 U.S. 715, 99 S.Ct. 1448, 59 L.Ed.2d 711 (1979).

to that of the plaintiff. In addition, the reference to the plaintiff's "right, title or interest" in § 2409a(c) suggests that the *plaintiff* need not claim "title" to the property in order for his action to proceed under § 2409a. Thus, the language of the statute indicates that the phrase "adjudicate a disputed title" does not limit the waiver of sovereign immunity under § 2409a to traditional title disputes. The statute plainly contemplates litigation against the United States to adjudicate disputes about lesser interests, such as Bowery's mortgage and the government's lease.

In addition, the legislative history shows that Congress used the concept of "quieting title" as a shorthand for almost any variety of suit concerning interests in land. The House Report states that § 2409a would permit suit againsst the United States by one who claimed an estate less than fee simple. Indeed, it states that a prospective plaintiff under § 2409a might claim no more than an easement or mineral rights. *See* H.R.Rep.No.92-1559, 92d Cong., 2d Sess. 6 (1972), *reprinted in* [1972] U.S.Code Cong. & Ad.News 4547, 4552. Surely the interest of a mortgagee—an interest that may empower him to force a sale of the property—is no less substantial than these examples that were before Congress. Thus, we think that a mortgage foreclosure action such as Bowery's is an action "to adjudicate a disputed title" within the meaning of 28 U.S.C. § 2409a.

The government's strongest argument for a contrary view ressts on a reading of § 2409a against 28 U.S.C. § 2410. Whereas § 2409a does not in terms refer to mortgage foreclosure actions, § 2410 does. It confers subject matter jurisdiction upon the district court "to foreclose a mortgage or other lien upon . . . real or personal property on which the United States has or claims a mortgage or other lien." 28 U.S.C. § 2410(a)(2). From

this explicit mention of foreclosure actions in § 2410, the government infers that § 2410 is the exclusive jurisdictional statute permitting foreclosure. Because the government does not claim a "mortgage or other lien" on 120 Church Street, it argues that Bowery's action is precluded.

Although the question is a relatively close one, we think the government makes too much of the specificity of § 2410. That rather complex statute is designed to resolve several specific problems that arise in the adjudication of disputes concerning property in which the government is interested as a secured creditor.[17] As observed by the House committee report with respect to § 2409a, "[t]itle 28, United States Code, section 2410, allows suits to be maintained when the Government's claim is in the nature of a security interest *only*." H.R. Rep.No. 92-1559, *supra*, at 6, *reprinted in* [1972] U.S.Code Cong. & Ad.News at 4551. (Emphasis added.) Thus it is not surprising that § 2410 mentions mortgage foreclosure actions in express terms, for such actions will frequently be the setting of conflicts between the United States and other secured creditors. By contrast, the generality of § 2409a reflects its broader purpose. As discussed above, § 2409a is an all-purpose jurisdictional statute, excepting only such actions as are otherwise specifically covered by other statutory provisions, and is designed to permit adjudication of a wide range of disputes involving "title," as broadly conceived by Congress, to land in which the United States has an interest. Section 2409a could not be made more specific without jeopardizing the very flexibility with which Congress sought to endow it.

---

[17] Section 2410 sets out special pleading rules for suits in which the government's interest is that of tax lienor, regulates the conduct of judicial sales affecting the government's security interests, and specifies procedures for certain redemptions by the United States and for discharge of its junior liens.

Thus we do not think that § 2410 should be read to limit the scope of § 2409a, and we conclude that the district court had jurisdiction to foreclose Bowery's mortgage.

B. The Government's Equitable Defenses

At trial, the government contended that even if there were jurisdiction to hear Bowery's suit, Bowery should be barred from foreclosure because of its assertedly inequitable conduct. Specifically, the government alleged that Bowery had concealed from the government its intention to disapprove the new lease, thereby causing the government to proceed with negotiations on the lease and to permit its second renewal option to expire. The district court rejected the government's defenses, finding that Bowery believed that the lease was subject to renegotiation after the award and that it had therefore not formed an intention to disapprove it. The government attacks these findings as clearly erroneous. They were not, and we affirm.[18]

IV. Remaining Contentions and the Issues on Remand

Our holdings that the government's lease was valid but that specific performance was properly denied dispose of the remaining contentions in these appeals. Because the government's lease was valid, Bedford was not entitled to damages on its counterclaim for wrongful occupancy, and that portion of the judgment in its favor must be reversed. On remand, the district court must adjudicate the govern-

---

[18] Our holding above that Bedford must be bound by the offer it permitted Congress to approve does not alter the analysis as to Bowery. Bowery's belief that the status of the offer was otherwise effectively negatives the knowledge and intent elements of the government's estoppel defense and the bad faith element of the unclean hands defense.

ment's claim for damages under the lease. In doing so, it should give content to the terms of the lease concerning the area to be demised and the rate for overtime services, and we think it would be germane to consider whether GSA's delay in securing congressional approval of the lease constituted a lack of cooperation sufficient to excuse Bedford from its obligation to renovate the premises within the period set forth in the lease. Of course, we leave the precise scope of the trial to the parties and to the district court's sound discretion.

Similarly, because the lease was valid, the government did not effect a taking through its occupancy of the building after October 31, 1978, and Bowery was entitled to receive only the rental specified by the lease agreement. On remand the district court must modify the assignment of rents to Bowery under the decree to reflect this lower rental rate.

Finally, we address the problem of the government's continued occupancy of 120 Church Street in light of our disposition of these appeals. Because we have upheld the district court's denial of specific performance to the government and its foreclosure of Bowery's mortgage against the government's leasehold, the government would have no present right to remain in the premises under principles of property law applicable to private actors. Section 2409a, however, is solicitous of the need to avoid interference with government operations, *see* H.R.Rep.No. 92-1559, *supra*, at 6, *reprinted in* [1972] U.S.Code Cong. & Ad News at 4552, and it does not countenance eviction or ejectment of the United States. The statute expressly provides that "[t]he United States shall not be disturbed in possession . . . of any real property involved in any action under this section pending a final judgment or decree, the conclusion of any appeal therefrom, and sixty days." 28 U.S.C. § 2409a(b). The section further pro-

vides that the government may elect to retain possession of the premises if the "final determination" of the action is "adverse" to it, provided that it pays just compensation, as determined by the district court having jurisdiction of the action, to the property owner. *Id.* Because we have concluded that the government is not entitled to specific performance of its lease, our decision is "adverse" to its possessory interest. Under § 2409a(b), the government will have sixty days from the issuance of our mandate on this appeal, which we take to be the "final determination" referred to in the statute, in which to make its election either to vacate the premises or to condemn some interest in them.

[4] In the event that the government elects to condemn an interest in the premises, we think it plain that just compensation for the taking so accomplished must be determined as of the date of the government's statutory election. Throughout the proceedings in this case, the government has disclaimed any exercise of its power of eminent domain, and has vigorously contended that it occupies 120 Church Street by contractual right. Because the government's occupancy has been merely the assertion of a contract right, it was not a seizure of the premises within the contemplation of cases such as *United States* v. *Dow,* 357 U.S. 17 (1958). This is true even though, as we have held above, the government's lease was not specifically enforceable. The government cannot be said to have taken property merely because its good faith estimate of the enforceability of its contractual rights later proves mistaken. *Cf. J.D. Hedin Construction Co.* v. *United States,* 456 F.2d 1315, 1328-29 (Ct.Cl.1972); *Acme Process Equipment Co.* v. *United States,* 347 F.2d 509, 537-38 (Ct.Cl.1965), *rev'd on other grounds,* 385 U.S. 138, 87 S.Ct. 350, 17 L.Ed.2d 249 (1969). Accordingly, any taking of an interest in 120 Church Street can occur only after the government has

abandoned its insistence upon its contractal right to occupy the building, as it must after our rejection of its claim for specific performance, and asserts a right to occupancy based upon its prerogatives as sovereign.

In conclusion, we reverse the judgment of the district court insofar as it dismissed the government's action for damages and awarded damages to Bedford; modify it insofar as the monetary award to Bowery was based on fair market rental of the property rather than the rental specified in the lease; and affirm it insofar as it denied specific performance to the government, declared that the government no longer has a leasehold interest in 120 Church Street, foreclosed Bowery's mortgage, quieted title to the building as requested by Bowery, and awarded Bowery an assignment of rents. We remand the matter for adjustment of the rental due Bowery under the decree, for trial of the government's action for damages, and for such other proceedings as may be appropriate. No costs.

Judge Moore reserves the right to file a separate opinion at a later date.

MOORE, Circuit Judge (dissenting):

I dissent.

Important agencies of government, the Internal Revenue Service (IRS) and the General Services Administration (GSA) are involved. The IRS has occupied, pursuant to a lease executed in 1962 between GSA and Bedford, the owner of the building, a 21 story building known as 120 Church Street in lower New York City. In my opinion the majority bases its decision on an extraordinary principle saying that: "Moreover, in the setting of the present case, we [the Court of Appeals] have ample power to construct rules of federal common law that may vary from the principles of general contract law". At ——. The "rules" which the majortiy would construct would be the elimination of the centuries-old fundamental essential of a valid agreement, namely, that before a valid contract

comes into existence, there must be a "meeting of the minds" of the parties. Despite this conceded deficiency, the majority would foist upon Bedford a lease to which as the district court found (and these findings were not reversed or held to be clearly erroneous) "Bedford clearly did not intend to be bound until outstanding items had been resolved" and that "Bedford's intent not to be bound and its belief that terms would be renegotiated after an award was made were manifested to the government". 497 F. Supp. at 863. Nevertheless, the majority concludes that "as a matter of federal law and regardless of the status of the bargain under general contract law [footnote omitted], we hold that Bedford's extension of its offer empowered GSA to accept that offer, and that GSA's delivery of the award on October 30, 1978, created a valid contract". At ——. This conclusion is followed by the rejection of an equally time-honored principle of contract law by saying: "We reach this conclusion even though GSA may have known that Bedford believed that its offer was not binding and that further negotiations would follow the award". At ——. The majority "assume the correctness of the district court's explicit findings that 'Bedford clearly did not intend to be bound [by its offer] until the outstanding items had been resolved' and that 'Bedford's intent not to be bound and its belief that terms would be renegotiated after an award was made were manifested to the Government, 491 F.Supp. at 863.'" The opinion accepts "as a matter of general contract law, the proposition that negotiations cannot form a contract if one party to them indicates to the other his intention not to be bound until some later time". At ——. However, it pushes aside this fundamental contract principle, saying: "Bedford, however, was not an ordinary commercial landlord; it sought its rents from public funds". At ——, and holding "that the negotiations formed a contract". At ——. If the negotiations formed a contract, this conclusion cannot be

reconciled with the opinion's assertion that "GSA's delivery of the award letter on October 30, 1978, created a valid contract". At ——. The offer which GSA was purporting to accept was the offer in Bedford's August 15, 1977 proposal, as amended. This offer was followed by some fifteen months of fruitless negotiations. The district court found that "It is also clear that the Government and Bedford did not reach an agreement on a number of material terms". In my opinion the court's finding that "there was no meeting of the minds as to a number of essential items" is sufficient to justify its conclusion that "no contract was made".

The majority acknowledges the district court's reliance upon "the parties' inability to agree on the rent to be paid during the renovations, the area to be leased, and the rate of overtime services. . . . [I]n the court's view, the existence of these disputed terms rendered the proposed lease substantially indefinite and therefore void". At ——. The majority, however, belittles the importance of these unresolved terms, saying:

> "We disagree. Neither the terms themselves nor the asserted disagreements concerning them were so significant as to preclude enforcement of the parties' bargain. * * * Even if the parties have left some terms of their agreement indefinite, a court may enforce the agreement if it has means of giving content to the indefinite terms . . . or if these terms are not material to the bargain. . . ." (citations omitted). At ——.

The majority disposes of the area problem by saying that there was to be "a mutual field measurement after delivery of the space and that any disagreement would be resolved through administrative proceedings", that "[T]hese modes of resolving the dispute were eminently

practicable, and the district court should have remitted the parties to them." (At ——) (citations omitted). Furthermore, "the total area in dispute—about 5% of the leased space—was relatively insignificant . . . and not so great as to preclude enforcement of the agreement". (At ——).

As to overtime rates, the opinion says that they were "susceptible of resolution [and] a relatively small part of the bargain". Furthermore, "the court could have reviewed this prior course of dealing, as well as standard practice in the indusstry, to set a reasonable rate". (At ——.)

The majority states that a lease was presented to Congress for its approval and approved by it. The fallacy of this fact assumption is established by the exhibits in the record. The GSA letter of June 8, 1978 to the Senate Committee on Environment and Public Works, reads: "In accordance with Section 7 of the Public Buildings Act of 1959, as amended, there is submitted for consideration by the Committee a prospectus which proposes a succeeding lease for space presently occupied at 120 Church Street, New York, New York". Exh. 118. No lease was submitted; only the offer and prospectus. That a "succeeding lease" was proposed and contemplated is clear. Under the heading "LEASE PROSPECTUS—120 CHURCH STREET, LOWER MANHATTAN, NEW YORK CITY:" there is stated "GSA proposed such a lease, for a firm term of 10 years, at an annual cost of $2,902,160 or $8.32 per sq. ft. including services and utilities". That the prospectus was to authorize negotiations is equally clear: "The proposal for negotiating a 10 year succeeding lease is actually an alternative to exercising the 5-year option that GSA already has". Exh. 119.

The Senate Committee approved the 120 Church Street prospectus under date of August 16, 1978. Exh. 120. An

accompanying report appears in the Congressional Record of the Senate in which it is stated: "The lessor [Bedford] will not undertake the needed work unless a new lease is negotiated". A. 1040.

During the year (1977-1978), extensive, but fruitless negotiations took place as revealed in the 4,175 pages of the record. They covered a wide variety of subjects, including the area to be occupied and the rental to be paid during phases of renovations. As the district court found, however, no meeting of the minds occurred. Nevertheless, and apparently to comply with its understanding of the lease requirement, GSA undertook to prepare, under date of December 13, 1978, on the required GSA Standard Form 2, a document entitled "U.S. GOVERNMENT LEASE FOR RENTAL PROPERTY". A rider attached thereto specified certain square foot rental rates.

The proposed llease was to be subject to "All terms, conditions and obligations set forth in Solicitation for Offers M.NY-76-560 dated June 28, 1977 (Amendments No. 1 dated July 13, 1977 and No. 2 dated July 26, 1977) thereto; the Lessor's offer dated August 15, 1977, as amended by letters dated September 6, 1977, November 1, 10, 15, 17, 18 and 28, 1977, December 8, 1977, January 31, 1978, and February 1, 1978; the Government's acceptance letter dated October 30, 1978; the Rider attached to the Lease". (A.851).

The presentation by GSA for the first time of the required lease brought immediate response from Bedford. On December 15, 1978, Bedford replied: "The lease as prepared by the General Services Administration is completely unacceptable to ownership. The provisions contained in the lease do not reflect, nor are they consistent with the solicitation and award". Exh. 40

That a written lease was contemplated rather than a correspondence-formed agreement is evident from the re-

quirement that "The successful offeror will be required to execute a US. Government lease for real property, as prescribed in the code of Federal regulations, 41 C.F.R. 1-16.6". (A. 856). The instructions specified that there be added "[p]rior to execution of the lease additional appropriate paragraphs . . . including all schedules and attachments as well as other provisions agreed upon". The offer of August 15, 1977 could not possibly have embodied the terms discused or agreed upon in the negotiations, the terms of which were constantly changing. Furthermore, the negotiations contemplated had not even taken place at that time. The disparity in the rental figures in the letter of October 30, 1978 and the proposed lease is further indicative of a lack of any meeting of the minds on this essential element. Therefore, the majority's assumption that the letter of October 30, 1978 was sufficient to create a valid and enforceable lease is contrary, in my opinion, to the facts and time-honored principles of contract law.

The remand, in effect, calls upon the district court to write a lease for the parties. It says: "On remand, the district court must adjudicate the government's claim for damages under the lease". Since the trial court has held that there is no valid lease it will have to create one despite its holding that there has been no meeting of the minds. This is made obvious by the direction that the court "should give content to the terms of the lease concerning the area to be demised and the rate for overtime services" At ——. Since the district court has already held that there has been no meeting of the minds on these two items, it will have to substitute its "mind" for that of the parties and direct them as to how their minds should function.[1]

As to occupancy: IRS has maintained its New York headquarters in the building for almost twenty years.

Despite the majority's recognition that the government should not be disturbed in possesion, the majority, in effect, tells the government "to make its election either to vacate the premises or to condemn some interest in them". At ——. The opinion does give recognition to the retention of possession by the goverment "provided that it pays just compensation, as determined by the district court having jurisdiction of the action to the property owner". At ——. The district court has taken testimony as to fair compensation and has fixed a price. I would also affirm its conclusions as to the Bowery mortgage.

As I foresee the future with Cassandra-like foreboding, a lease will have to be written for the parties by federal courts. I believe this possibility can be avoided by adhering to the requirement that there be a meeting of the minds at the outset. I would affirm the district court.

---

[1] The drafting of a lease is further complicated for the trial court by the majority's statement that "We think that Bedford must be held to the terms of its November 1977 proposal, and that the agreement was therefore definite". At ——.

Appendix B—Opinion of the United States District Court.

UNITED STATES OF AMERICA,

Plaintiff,

v.

BEDFORD ASSOCIATES, a Partnership, Doris K. Carver and Samuel Ades, Individually and as partners of Bedford Associates, and Amcar Management Corp.,

Defendants,

and

THE BOWERY SAVINGS BANK,

Intervenor.

THE BOWERY SAVINGS BANK,

Plaintiff,

v.

BEDFORD ASSOCIATES, a Partnership, Doris K. Carver and Samuel Ades, Individually and as partners of Bedford Associates, and United States of America,

Defendants.

Nos. 79 Civ. 1522 (HFW), 79 Civ. 1482 (HFW).

United States District Court,
S. D. New York.

May 24, 19980.

OPINION

WERKER, District Judge.

These two consolidated actions arise from the Internal Revenue Service's (the "IRS") occupancy of a 21-story office building located at 120 Church Street owned by the

defendant Bedford Associates.[1] The plaintiff-intervenor Bowery Savings Bank ("Bowery") is the holder of a consolidated first mortgage on the premises. These actions having been tried on the merits before the Court on March 17-20 and 24-26, 1980, and all of the evidence having been duly considered, judgment is rendered in favor of Bedford in action no. 79 Civ. 1522 and in favor of Bowery in action no. 79 Civ. 1482. Pursuant to Fed.R.Civ.P. 52(a), my findings of fact and conclusions of law follow.

Facts

In 1962, the United States General Services Administration ("GSA") executed a lease of the premises with Bedford for a ten-year term commencing on November 1, 1963, with two five-year renewal options. The IRS remained in continuous occupancy of the building for the initial ten-year period. On October 25, 1973, the Government exercised its first renewal, subject to the approval of Congress, which was obtained for both the first and second renewal options in December 1973. The IRS remained in continuous occupancy under the first renewal option through October 31, 1978. The Government did not exercise its second renewal option, and the lease expired on October 31, 1978. PTO, Agreed Findings 4-6.[2]

---

[1] Bedford Associates is a partnership consisting of the defendants Doris K. Carver and Samuel Ades. The building is operated and maintained by the defendant Amcar Management Corp. ("Amcar"). Bedford Associates, Carver, Ades and Amcar will hereinafter be collectively referred to as "Bedford."

[2] "PTO" refers to the consent pretrial order dated March 17, 1980. "HX" refers to exhibits introduced at the preliminary injunction hearing. "A." refers to the appendix on the apeal of this Court's preliminary injunction order. "GX" and "DX" refer to the Government's and Bedford's exhibits introduced at trial, respectively.

Appendix B

A. *The Solicitation for Offers*

During the course of the first five-year renewal period, the Government determined that 120 Church Street no longer met the needs of the IRS and determined to lease improved space. PTO, Agreed Finding 6. After conducting market surveys, on June 28, 1977 GSA sent a Solicitation For Offers (the "Solicitation") to 12 prospective lessors, including Bedford. The Solicitation provided, *inter alia,* that all offers with an annual rent in excess of $500,000 were required to remain open for 240 days from the last date of receipt of offers by GSA. PTO, Agreed Finding 7; HX 12 (A. 722). The Solicitation called for offers of 317,000 net usuable square feet, plus an option on an additional 8,000 net usable square feet, which space was to be contiguous. HX 12 (A. 734). A method for computing net usable square feet was set forth in the Solicitation. *Id.* (A. 788).

B. *The Negotiations*

On August 15, 1977, the last date for receipt of offers, GSA received three offers in response to the Solicitation, one of which was from Bedford. PTO, Agreed Finding 8. The other two offers were submitted by the Port Authority of New York and New Jersey (the "Port Authority") for space in the World Trade Center and by the Prudential Insurance Company of America ("Prudential") for space at 100 Church Street. *See* HX 186 (A. 1234); HX 188 (A. 1276). Thereafter, GSA entered into negotiations with the three offerors concerning their respective offers. HXs 187, 189, 190 (A. 1268, 1333, 1345).

(1) Bedford's Offer and the Purported Competition

Bedford's original offer in response to the solicitation was economically viable when made and was made in good

faith with the expectation that Bedford would retain ownership of the building. Tr. 373, 381, 412-13 (D. Carver); tr. 628, 651-52 (M. Madonick); tr. 812-19 (C. Madonick).[3] Bedford offered the entire building, plus an additional 8,873 square feet at 110 Church Street, for a total of 350,024 square feet at $3,073,210.72 per year, including electricity, or approximately $8.78 per square foot. HXs 15, 16 (A. 799-811); DX 275. The offer also included approximately $1 million worth of construction. A. 223 (M. Madonick). *See* HX 16 (A. 811); HX 18 (A. 814-16).

The Port Authority and Prudential offers called for rents substantially higher than that provided for in the Bedford offer. The Port Authority offer was for noncontiguous space at $14.41 per square foot, substantially excluding electricity. The Prudential offer was for 317,000 square feet at $12.07 square foot, excluding electricity, and exceeded the limitation set forth in the Economy Act. HX 119 (A. 1032); tr. 64 (Beck). The space referred to in these two offers may have been more attractive than 120 Church Street; however, because of the noncontiguous space of the Port Authority offer, the violation of the Economy Act of the Prudential offer, and the comparatively high rents of both, these offers were not competitive with the Bedford offer.

The Solicitation provided that there would be no public opening of bids and that all offers would be kept strictly confidential until an award was made. HX 12 (A. 722). GSA did not disclose the identities of the other offerors to Bedford during the negotiations. However, GSA did represent to Bedford that there was competition and used the existence of other offers as leverage in its negotiations with Bedford. *See* HX 190 (A. 1350, 1351) (memorandum

---

[3] Bedford did not begin to consider selling the building until December 1977 or January 1978. Tr. 644 (M. Madonick), *see also* tr. 825-26 (C. Madonick).

of 11/2/77 meeting: GSA "stressed need to be competitive," "noted the competition . . . that is actively and strenuously after this lease"), (1352-53) (memorandum of 11/7/77 meeting), (1354) (memorandum of 11/9/77 meeting), (1358) (11/28/77 memorandum). *See also* A. 406 (M. Carver); tr. 82-83 (Beck) (GSA wanted to give the impression that the other bids were competitive). As late as November 28, 1977, after GSA had determined to recommend the Bedford offer, and after it had become clear that the other offers were not competitive, GSA was still referring to "other offers" in its negotiations. HX 190 (A. 1358). The Prudential representatives had advised GSA on November 22, 1977 that Prudential's best offer had been made, that its offer could not be reduced to meet the Economy Act limitation. In fact, the Prudential representatives at that meeting asked to be notified "as soon as possible as to when [Prudential could] be released from [its] offer." HX 189 (A. 1342).

Although the Prudential offer was net of utilities and the Port Authority offer was substantially net of utilities, GSA advised Bedford that it could not and would not consider offers net of utilities. A. 287, 321-23 (M. Madonick). GSA also told Bedford during the course of negotiations that the other offerors were offering new ceilings and persuaded Bedford to offer new ceilings as well. A. 96 (Margolin); A. 232 (M. Madonick); HX 18 (A. 816).

(2) Rent During Construction

At the time GSA commenced its search for improved space, it anticipated that the entire process of negotiating, obtaining congressional approval and making an award would be completed by April 1978. Because the IRS was supposed to be relocated by November 1, 1978, it was important that this schedule be met. DX 208; tr. 138-39

(LeDuc). Although Bedford was told by GSA on a number of occasions that no one could predict with certainty when congressional approval would be obtained or when an award would be made, tr. 45-46 (Beck); tr. 127 (LeDuc); A. 78-79 (Margolin), Bedford reasonably believed that an award under the Solicitation would be made by the end of 1977 or within the first few months of 1978. The Solicitation called for occupancy by November 1, 1978, HX 12 (A. 734), and Bedford knew that the Government wanted the new space by that date. A. 401-04 (M. Carver); tr. 618-19 (M. Madonick). Bedford's offer in response to the Solicitation included a construction package, and it had planned on beginning construction by early 1978. Tr. 620 (M. Madonick); tr. 337-39 (M. Carver). The Government was aware of the fact that Bedford wanted to start construction early in 1978. A. 234, 363-64 (M. Madonick); *see also* HX 21 (A. 823).

On November 18, 1977, Bedford wrote to GSA that it anticipated that a number of floors would be completely renovated prior to "the November 1st, 1978 commencement date of the new lease." HX 21 (A. 823).[4] Bedford proposed that in the event floors were not renovated by November 1, 1978, the Government would pay the rent called for under the second renewal option to the 1962 lease for all unrenovated floors on a pro rata basis. HX 21 (A. 823). As the delays in the processing of the proposed lease occurred, it became apparent to Bedford that the renovation were not going to proceed as quickly as anticipated and that consequently the rent it would be receiving after November 1, 1978 under the November 18, 1977 proposal would be much lower than it had anticipated. *See* A. 406-07, 411 (M. Carver); A. 431 (D. Carver). The

---

[4] In contrast, the Solicitation provided that "[d]etermination of the commencement date shall be made after full occupancy of the space has been completed." HX 12 (A. 783).

delay in the making of an award threw the construction schedule off, and the resultant increases in construction costs rendered Bedford's bid no longer viable. A. 411-13 (M. Carver); tr. 617-20 (M. Madonick); HX's 30-35 (A. 836-41).

On March 2, 1978, Bedford proposed in writing to GSA that it pay the first renewal option rent and all utilities until the completion of construction or 18 months after the execution of the new lease, whichever came first, with the rent under the new lease to begin then. HX 25 (A. 830). Although GSA privately decided to reject this proposal, HX 175 (A. 1214) ("We don't want it"), Bedford was advised by letter dated April 5, 1978 that the proposal could be considered at a later time. HX 26 (A. 832); *see also* A. 248-49, 251 (M. Madonick). Bedford reasonably believed that this proposal would be negotiated with the Government after the award was made. A. 255 (M. Madonick); *see* DX 234. Bedford had been advised by GSA that an award letter was "in essence, a letter of intent by the United States Government," tr. 622 (M. Madonick), and, as Margolin himself testified, Bedford was told by GSA "to reserve all further changes" until after an award was made. A. 72-73. The March 2, 1978 proposal also made it clear that Bedford was withdrawing the November 18, 1977 proposal: the March 2d letter plainly stated, "As per our meetings and discussions, we propose the following as the terms of rental during the constsruction period." HX 25 (A. 830).

(3) Square Footage

Bedford's original offer in response to the Solicitation called for a total of 350,024 square feet at $3,073,210.72. Some 311,727 square feet of this space was office space, and the balance of 38,297 square feet was storage space,

29,424 square feet at 120 Church Street and 8,873 square feet at 110 Church Street. HX 15 (A. 799). As a result of negotiations, the rental and footage figures underwent a number of changes. By December 8, 1977 the proposed rent had been reduced to $2,980,400 for 282,000 square feet of office space, 35,000 square feet of storage space, plus the optional 8,000 square feet of office space.[5] The provision for storage space at 110 Church Street was eliminated. HX 22A (A. 825). A subsequent amendment reduced the proposed rents for the two five-year optional renewal periods. HX 24 (A. 828). These reductions resulted from GSA's representations that Bedford had strong competition, from GSA's indications that it would if necessary exercise the second renewal option under the 1962 lease, and from GSA's claim that Bedford's offer had "quite a bit of fat" in it. HX 190 (A. 1350). This last claim was made despite GSA's knowledge that Bedford was seriously underestimating its operating costs. HX 191 (A. 1385).

Bedford originally offered all of 120 Church Street. However, when its offer was subsequently amended so that the Government would only be occupying 325,000 square feet under the new lease, including the optional 8,000 square feet, Bedford believed that there would be one or two floors of vacant space in the building after October 31, 1978. Tr. 632-35 (M. Madonick); A. 262-63 (M. Madonick). GSA also believed that there would be space left over in the building under the proposed new lease. On May 6, 1977, GSA had written that the building contained 333,120 net usable square feet "based on current measuring criteria." DX 207, at 2. The Solicitation called only for

---

[5] Bedford had initially proposed an increase in rent to $3,318,227 as a result of the increased cost of construction. HX 18 (A. 817) (attachment #3 to letter dated 11/1/77); tr. 628-30 (M. Madonick).

325,000 net usable square feet, including the optional 8,000 square feet. At a June 1977 meeting between IRS and GSA, prior to the issuance of the Solicitation, it was indicated that 120 Church Street contained more space than IRS was then occupying ,and that consequently the upper floors would probably not be necessary. DX 209. The Government was given "the right to select the floors it [would] occupy," DX 214; *see also* HX 190 (A. 1351), and GSA acknowledged to Bedford that possibly one or two floors would not have to be renovated because the Solicitation was for 282,000 square feet. HX 190 (A. 1351). By December 9, 1977, however, the IRS had apparently decided that it wanted the entire building. DX 215.

During December 1977 and January 1978, Bedford and GSA had a number of discussions concerning the square footage of 120 Church Street. On January 31, 1978, Ed Spitzer met with Mike Madonick and measured the floor plans. The two were in substantial agreement as to the measurements of the building, but because they did not agree on the applicability of the 10 per cent corridor *reduction* factor, they were not in substantial agreement as to the net usable square footage. Tr. 633-35 (M. Madonick); *see* tr. 277-78 (Spitzer).[6] Bedford did not believe the corridor deduction factor was applicable because the proposed remodelling called for "open landscaping," space which does not require fixed corridors. Tr. 633-35, 665-66 (M. Madonick); *see also* tr. 824 (C. Madonick).

(4) Overtime Services

The Solicitation provided that ovetime services would be furnished by the lessor at the Government's request at rates to be agreed upon. HX 12 (A. 726, 774). Although

---

[6] GX 527 contains the entry 356,822.7 with the notation "RENTAL AREA; NOT DEDUCTING FOR CORRIDORS."

Bedford proposed overtime rates, HX 18 (A. 818), the parties never did reach an agreement as to the rate the Government would pay for overtime services. HX 38 (A. 854); DX 234; A. 325-26 (M. Madonick). The cost of overtime services was a significant expense, having cost the Government at least $90,000 per year for several years prior to and including 1975. HX 10 (A. 716).

(5) The Second Renewal Option

Under the provisions of the 1962 lease, GSA's right to exercise its second renewal option was to expire on or about May 1, 1978, 180 days prior to the expiration date of the first renewal of the lease. The notice provision of the lease provided for notice of renewal "at least 180 days before this lease or any renewal thereof would otherwise expire." HX 1 (A. 677). Although two 1973 amendments to the lease, made at the Government's request, reduced the renewal notice period first to 90 days and then to 30 days, thse amendments did not refer to renewal of any renewal of the lease. HXs 2, 3 (A. 692, 693). At the time these amendments were made, there was no discussion of extending the renewal notice period for the second five-year option. Tr. 415-16 (D. Carver). The 1973 extensions were granted because GSA needed the additional time to obtain approval from Congress for exercising the renewal options. A. 47 (Margolin). Since Congress approved both renewals in 1973, the reason for extending the notice period did not exist in 1978. The 1973 amendments thus did not affect the renewal notice period for the second renewal option, and the Government's time to exercise the renewal had indeed expired on or about May 1, 1978.

GSA, however, was apparently under the impression that it could renew the lease up to 30 days prior to the expiration date, and in September of 1978 it requested a

waiver of the notice requirement. Tr. 38 (Beck). Michael Madonick and Dewey Carver advised GSA that it was Bedford's position that the second renewal option had already expired. Sidney Beck advised Dewey Carver that if a waiver were not granted, GSA would nevertheless seek to exercise the second option. Beck further told Dewey Carver that if Congress approved the proposed new lease, the second renewal would not be exercised. To avoid difficulties and a possible lawsuit, and because of Beck's assurances that the second renewal option would not be exercised if congressional approval was obtained, Dewey Carver reluctantly "waive[d] the 180 day notice to renew and grant[ed GSA] the right until October 31, 1978, to exercise the [second] option to renew . . .". HX 36 (A. 844); *see* tr. 39-40 (Beck); A. 427-29 (D. Carver).

The Government's efforts to obtain a waiver of the renewal notice requirement were made in spite of the fact that it had decided, long before these efforts were made, not to exercise the second renewal option. *See, e.g.,* DX 206 (IRS letter dated 3/22/77); HX 11 (A. 720) (GSA memorandum dated 6/2/77); DX 216 (draft prospectus attached to GSA cover letter dated 12/16/77). Although GSA representatives may have told Bedford on a number of occasions that the Government would exercise the second option in the event suitable improved space was not found, *see, e.g.,* HX 190 (A. 1350); A. 181 (Margolin); tr. 12, 14-15 (Turetsky), the Government would not have actually done so. A GSA memorandum dated April 1, 1977 stated that if a satisfactory site for the IRS were not found by September 30, 1978, the Government would stay at 120 Church Street as a holdover tenant rather than exercise the second renewal option. DX 206. Exercising the second renewal option was simply not an acceptable or viable alternative, for it was "just about . . . impossible" for the IRS to function efficiently at 120 Church Street without

renovations and improvements. A. 61 (Margolin); *see also* DX 206 (IRS letter dated 3/22/77: "[S]everal years ago, we were forced into accepting a 5-year renewal . . . . We do not intend for this to happen again. . . . "[W]e do not want GSA to enter into a 5-year renewal at our present location in October 1978"); DX 211 (GSA memorandum of 11/4/77 meeting with IRS: "IRS noted it does not want to renew the current lease").

GSA knew that exercising the second renewal option would result in financial disaster to Bedford. A. 401 (M. Carver). GSA was told that renewal would cause ownership to lose the building, HX 190 (A. 1350), and it knew that the renewal rent would not cover ownership's debt service, much less provide for a return on the investment. *See* HX 191 (A. 1377) (renewal rent would leave $117,704 for mortgage indebtedness, interest, return on investment); HX 52 (A. 1002-03) (interest expense exceeded $600,000 yearly); HX 53A (A. 1018) (GSA calculated Bedford's annual loss under renewal rent to be over $600,000). *See also* A. 180 (Margolin); tr. 21 (Turetsky); tr. 62 (Beck).

(6) The Government's Requests for Extensions

By letters dated February 28, June 6, 14, July 25, August 30, and September 22 and 27, 1978, Bedford granted the Government's requests for extensions of the time within which the Government could accept Bedford's offer until October 31, 1978. HXs 29, 30, 31, 32, 33, 34, 35 (A. 835-41). In these letters, Bedford emphasized the economic hardship it was sustaining because of these delays, and expressed the hope that this fact would be recognized by GSA in negotiations. Bedford reasonably believed that the terms of its offer would be renegotiated following an award to compensate it for the economic injury it was suffering by reason of the Government's delays. A. 409-10 (M. Carver); 641-43 (M. Madonick); tr. 389, 391 (D. Carver); tr. 826-29, 837 (C. Madonick), A. 455-59 (C. Madonick); *see also* GX 510, 511.

Appendix B

(7) Termination of Negotiations

Negotiations between GSA and Bedford regarding the latter's offer formally commenced on August 25, 1977. HX 190 (A. 1345). During the course of the negotiations, Bedford submitted ten letters of change to its original offer, dated September 6, 1977, November 1, 10, 15, 17, 18, 28, 1977, December 8, 1977, January 31, 1978, and February 1, 1978. HXs 16, 17, 18, 19, 20, 21, 22, 22A, 23, 24 (A. 811-29). Additional letters submitted by Bedford from February 28, 1978 onward must also be considered to have revised or supplemented Bedford's original offer. HXs 25 (A. 830), 29-37 (A. 835-48). The negotiations did not cease in February of 1978, as alleged by the Government, but continued until after November 1, 1978. *See, e.g.,* DX 218 (GSA mem. dated 2/23/78); DX 230 (GSA mem. dated 8/15/78); GX 511 (letter on behalf of Bedford dated 9/14/78); DX 235A (GSA mem. dated 10/6/78); GX 556 (GSA mem. dated 10/26/78); DX 234 (handwritten GSA notes dated 12/29/78 through 1/10/79). *See also* tr. 642-43, 676-79 (M. Madonick); A. 276-82 (M. Madonick) & HXs 176 (A. 1215-16); A. 331-32 (M. Madonick) & HXs 177, 178 (A. 1217-18); A. 384-87 (M. Madonick). Although GSA may have considered negotaitions closed as of February 2, 1978, see A. 68, 112-13 (Margolin); tr. 50-51 (Beck); tr. 180-82 (LeDuc), it did not give Bedford advance written notice of termination of negotiations as required by the GSA handbook on the acquisition of leasehold interests in property, DX 248, chap. 3-18, at 24, and also by 41 C.F.R. § 1-3.805-1(b). The April 5, 1978 letter purporting to provide written notice of termination of negotaitions, see A. 113 (Margolin), was sent two months after negotiations had allegedly been terminated. HX 26 (A. 832). Moreover, although the letter states that GSA was in no position

"to consider any revision of the terms and conditions of the Solicitation," it left the door open for further negotiations by stating:

> We believe your new proposal needs additional detail and amplification for use to come to a conclusion. If your proposal can be justified as economically and otherwise in the best interest of the Government, it will be submitted to our Central Office for approval, after the award is made.

HX 26 (A. 832).

C. *The Proposed Lease*

By November 1977, GSA had concluded that it would recommend making the award to Bedford. DXs 212, 213, 214. The New York office of GSA did not forward its recommendation to GSA in Washington until April 1978. Tr. 72 (Beck). A draft prospectus was sent to Washington on December 16, 1977, DX 216, but the final prospectus was not sent to Congress until June 1978. HX 118 (A. 1028). Although six months elapsed between the submission of the two prospectuses, there is no substantial difference in their contents.

Congressional approval was granted by October 4, 1978, HX 27 (A. 833), and an award letter purporting to accept an offer made by Bedford was delivered to Bedford on October 30, 1978. PTO, Agreed Findings 11, 12; HX 28 (A. 834). A copy of the award letter was received by Bowery on October 30, 1978. PTO, Agreed Finding 13. The award letter purported to lease 282,000 net usable square feet of office space and 35,000 net usable square feet of storage space, with an option to lease an additional 8,000 net usable square feet of office space. HX

28 (A. 834). The letter also stated that the "Government anticipates it may occupy the entire building. . . ." *Id.* On December 3, 1978, GSA tendered a proposed lease to Bedford. PTO, Agreed Finding 16; *see* HX 38 A. 849); HX 39 (A. 965).

In response to the award letter, Bedford wrote that it could not proceed with the proposed construction and requested that the new rental be paid notwithstanding the fact that the construction had not yet commenced. HX 131 (A. 1059). By letter dated December 15, 1978, Bedford formally rejected the proposed lease, stating:

> The lease as prepared by [GSA] is completely unacceptable to ownership. The provisions contained in the lease do not reflect, nor are they consistent with the solicitation and award.

HX 40 (A. 966). The letter further stated that Bedford was prepared to "negotiate a lease which is fair and acceptable to all parties." *Id.; see also* HX 132 (A. 1060) (Bedford letter dated 12/11/78: check for November 1978 rent accepted "under protest"). The Government, in response, maintained that the Solicitation, Bedford's offer as amended, and the award constituted a binding contract and urged Bedford to fulfill its obligations. HX 41 (A. 967-69).

The new "lease," as alleged by the Government, purported to incorporate Bedford's November 18, 1977 letter. Under this new "lease," because no floors had been renovated by November 1, 1978,[7] Bedford would only have

---

[7] In December 1975, the Government and Bedford had entered into a supplemental agreement to the 1962 lease whereby Bedford released the Government from any claims for excess electricity and agreed to and did make alterations on four floors of the building,

(footnote continued on following page)

been entitled to receive the second renewal option rental while being required at the same time to pay increased costs of some $400,000 per year in utilities[8] and to commence some $3.8 million worth of construction. *See* HX 191 (A. 1377). These obligations would have been even more onerous than those that would have been imposed under the second renewal option alone. The second renewal option rent was $2,226,194, or approximately $6.85 per square foot per annum, using the Government's figure of 325,000 square feet. This rental was thus substantially below GSA's appraised Fair Annual Rental of $11.86 per square foot, HX 191 (A. 1376), and its SLUC rate, or standard level user's charge, of approximately $13.00 per square foot. Tr. 603-04 (Burke). Carl Madonick testified that GSA told him in early 1978 that GSA was charging the IRS $11.14 per square foot for 120 Church Street.

According to the Government's own estimates, the alleged new "lease" would result in extreme hardship to Bedford. A GSA staff appraisal indicated that the rent under the second option would leave Bedford with only $117,704, for mortgage indebteness and interest and return on capital. HX 191 (A. 1377). A GSA audit completed in January 1979 estimated that under the new lease after construction Bedford would lose some $521,616 annually. HX 50A (A. 1017).

(footnote continued from preceding page)

and in consideration whereof the Government agreed to and did assume the cost of all utilities for the balance of the first renewal term. HX 10 (A. 703). Although the four renovated floors only needed additional minimal work, they did not meet the requirements of the Solicitation and thus were not considered to be "completely renovated" for purposes of the November 18, 1977 proposal. *See* tr. 95-96 (Beck); *but see* HX 190 (A. 1351).

[8] The Government had been paying for all utilities in accordance with the December 1975 supplemental agreement. *See* note 8 *supra*. Under the alleged new lease, Bedford was to pay for all utilities other than excess electricity.

Appendix B

D. *Bowery's Mortgage*

Bowery's mortgage on the premises, as amended on or about August 1, 1975, provided that Bedford would continue negotiations with the United States for the leasing of the premises on terms more favorable than the 1962 lease, and that such terms must meet with the approval of Bowery before acceptance thereby by Bedford, such approval not to be unreasonably withheld. PTO, Agreed Finding 14; *see* HX U, at ¶ 25 (A. 1525). Bowery's right to approve any new lease was a matter of public record, see HXs M-U (A. 1480-520), and the Government was aware of the existence of Bowery's mortgage at least as early as 1972. A. 159 (Margolin); HX 52 (A. 992, 996); tr. 99 (Beck). Moreover, in 1975 Carl Madonick told GSA that Bowery had the right to approve any new lease entered into between Bedford and the Government. Tr. 522-26.

Bowery did not receive a copy of the proposed lease until January 1979, when Follis of Bowery requested and received a copy from Spitzer of GSA. A. 442-43 (Marini); tr. 506 (Follis). In August of 1977, Carl Madonick had advised Bowery that Bedford was submitting a bid to the Government for a new lease on 120 Church Street. At that time, he provided Bowery with a copy of the first page of Bedford's bid. A. 482, 512-13 (C. Madonick); tr. 488 (Follis). On 29, 1978, Carl Madonick wrote to Bowery and informed it of some of the terms of Bedford's bid. GX 509. By September 1978, Bowery had received sufficient information to make some initial calculations regarding the financial advisability of the terms proposed by Bedford's bid. Although Bowery personnel did conclude on the basis of the information then available to it that the lease then proposed would be unacceptable, tr. 459-66 (Babyak); tr. 495, 499 (Follis), this con-

clusion was a preliminary one based on figures which the Bowery personnel believed would be further negotiated. Bowery's understanding, from September 1978 onward, of the Solicitation, Bedford's offer, and an award was that these would serve as basis for negotiating a lease, and that only the lease would constitute the binding agreement between the parties. In a letter dated September 14, 1978, Carl Madonick advised Bowery that "[o]n the basis of the award, lease negotiations will be entered into beteen the parties and when consummated the lease is the binding agreemnt." GX 511. A Bowery file memorandum dated September 7, 1978 states that "[a]t this stage, everything is a bid and the actual lease will have to be negotiated." GX 510. Bowery was under the impression that a number of items had not yet been resolved, such as square footage and who would pay for utilities, items which Bowery believed were just as important as a rental figure since these items would bear heavily on the profitability of the building. Tr. 493-94, 502-05 (Follis).

On April 4, 1978, Bedford received $207,194.87 as a tax refund from tax certiorari proceedings for the years 1974-75, 1975-76 and 1976-77, which Bedford did not pay to Bowery. As of March 1, 1980, the total principal amount due and payable under Bowery's first mortgage was $10,222,096.03, the total interest accrued and payable thereunder was $2,372,376.66, and real estate tax and water and sewer arrears (liens prior to the lien of Bowery's first mortgage and due and payable under that mortgage) totalled $784,627.22. Bowery's first mortgage is presently in default and has been in default since prior to the commencement of Bowery's action on March 21, 1979. Bedford's failure to pay the accrued interest and real estate tax and water and sewer arrears set forth above, together with applicable late charges, constitute

acts of default under the first mortgage. PTO, Agreed Findings 18-20.

By commencement of its action on March 21, 1979, Bowery elected to and did declare the entire principal sum of its first mortgage to be in default and to be immediately due and payable. Bowery Complaint ¶ 44. Because of Bedford's default under the mortgage, Bowery presently holds an assignment of all rents from the premises. HX U, at ¶ 14 (A. 1523-24).

E. *The Instant Proceedings*

By letter dated March 20, 1979, Bedford informed GSA that it would "terminate all services, including electricity, in 120 Church Street at 6:00 P.M. on March 23, 1979 and close the building" unless the United States paid a "reasonable and fair rent" for its continued occupancy. PTO, Agreed Finding 17. The Government filed suit on March 22, 1979, and moved that same day for a temporary restraining order and a preliminary injunction enjoining Bedford from closing and terminating services to the building. After the Government amended its complaint to add a count alleging the existence of a valid lease, a temporary restraining order was granted with Bedford's consent. Bowery was granted leave to intervene. A preliminary injunction hearing was held between March 28 and April 4, 1979, at the conclusion of which the Court issued a preliminary injunction in favor of the Government against Bedford on the conditions that the rents be paid to Bowery and that the Government pay the rent due under the second renewal option plus all utilities without set-off. On appeal, the second circuit affirmed the Court's conditioning the granting of injunctive relief on the Government's performance of a condition precedent, but remanded with instructions that the injunction be modified

to provide for payment by the Government of the second renewal rental plus $12,278.64 per month on account of completed renovations plus $14,000 per month on account of excess electricity consumption. *United States v. Bedford Associates,* 618 F.2d 904 (2d Cir. 1980).

The Government seeks, in addition to injunctive and declaratory relief, damages for injuries it allegedly sustained as the result of Bedford's purported breach of the alleged lease. Bedford's amended answer, filed July 30, 1979, denied the existence of a lease, and argued that even if a lease contract had been created, it was unenforceable. The amended answer also set forth a counterclaim for the fair market rental value of the building.

Bowery's suit was filed on March 21, 1979 for a declaratory judgment quieting title, foreclosure of its mortgage, and an assignment of rents. Bedford's answer set forth the affirmative defenses of lack of subject matter jurisdiction and laches and counterclaimed for payments from the rents which Bowery was by court order collecting. The Government moved to dismiss the complaint for lack of subject matter jurisdiction, and the motion was denied in my opinion dated March 18, 1980. The Government's answer was not filed until April 7, 1980; it raised, *inter alia,* the affirmative defenses of unclean hands and waiver.

These cases, having been consolidated in April 1979, were tried together in March 1980, and the parties thereafter submitted proposed findings of fact.

By letter dated April 18, 1980, Bowery moved to strike the Government's defenses of unclean hands and waiver on the ground that the defenses have been waived by the Government's failure to assert them in a timely fashion. By letter dated May 6, 1980, the Government moved to strike certain proposed supplemental findings of fact filed by Bedford on the ground that they were not submitted in a timely manner. Since these actions are essentially

equitable ones, and because of the expedited manner in which these cases were brought to trial both of these pending motions are hereby denied. The merits will be reached on all claims.

DISCUSSION

The principal issues before the Court are (1) whether the Government and Bedford entered into a valid lease agreement, (2) whether, assuming a lease agreement was made the agreement is enforceable, and (3) whether Bowery is entitled to foreclose its mortgage. In the event a judgment of foreclosure is rendered, the question of valuation of the property must also be addressed.

A. *The Alleged Lease Formation*

[1, 2] Negotitions and preliminary agreements do not constitute a contract "if either party knows or has reason to know that the other party regards the agreement as incomplete and intends that no obligation shall exist until other terms are assented to or until the whole has been reduced to another written form." Restatement (Second) of Contracts § 26, Comment B (tentative draft no. 1, 1964). As the second circuit has observed, "the crucial question is whether the parties intended not to be bound, or whether either or them manifested an intent to the other not to be bound, until a fully integrated contract had been executed." *Banking & Trading Corp. v. Floete,* 257 F.2d 765, 769 (2d Cir. 1958). If there is no "meeting of the minds" on all of the essential terms or if some of the essential terms are too indefinite, there is no contract. *Interocean Shipping Co. v. National Shipping & Trading Corp.,* 462 F.2d 673, 676-77 (2d Cir. 1972); *V'Soske v. Barwick,* 404 F.2d 495, 500 (2d Cir. 1968), *cert. denied,* 394 U.S. 921, 89 S.Ct. 1197, 22 L.Ed.2d 454 (1969).

Appendix B

[3] The record clearly demonstrates that Bedford did not intend to be bound until the entire leasing agreement was completed and reduced to a fully integrated contract. Bedford reasonably believed that a number of items had simply not yet been resolved, and further, that the terms of the original offer would be renegotiated to take into account the damages it had sustained as a result of the Goverment's delays in processing its offer. More specifically, Bedford reasonably believed that its utilities exchange proposal, the square footage being rented, the rates for overtime services, and adjustments to compensate Bedford for the increased construction costs caused by the Government's delay were matters to be further discussed following an award and prior to the signing of a lease. It was also Bowery's understanding that a number of items would be further negotiated after an award was made. Bedford's intent not to be bound and its belief that terms would be renegotiated afteer an award was made were manifested to the Government. Although the Government did on a number of occasions advise Bedford that negotiations were closed, it frequently indicated that the matters could and would be discussed after an award. The Government in effect advised Bedford that while the terms of the proposed lease could not be further negotiated pending congressional approval, the terms would be discussed once congressional approval was obtained and an award made. Hence, negotiations were not in fact closed.

It had become apparent to Bedford as early as March 2, 1978 that its offer was no longer economically viable in light of the delays in obtaining an award, and it therefore made its utilities exchange proposal. Although the Government may have privately rejected the proposal, it advised Bedford, in effect, that it was deferring a decision on the proposal, and let Bedford to believe the mat-

ter would be raised after an award. Had Bedford not believed that this proposal and other terms of the contract would be discussed further after an award, it would not have continued to grant the Government extensions of time in which to accept an offer it knew was no longer economically feasible. Bedford clearly did not intend to be bound until the outstanding items had been resolved.

It is also clear that the Government and Bedford did not reach an agreement on a number of material terms. There was no meeting of the minds as to the rent to be paid during construction. The November 18, 1977 proposal was based on Bedford's assumption that the commencement date of the new rental figure would be November 1, 1978. The Government, on the other hand, believed that the "commencement date" would not be determined until after "full occupancy ha[d] been completed." A. 783. In any event, the November 18, 1977 proposal was clearly withdrawn by the March 2, 1978 utilities exchange proposal. GSA's April 5, 1978 letter deferred a decision on the utilities exchange proposal, and the matter was never finally resolved. Bedford and GSA were also not in agreement as to the portion of the building the IRS would be occupying. The award letter stated that the "Government anticipates it may occupy the entire building . . ." HX 28 (A. 834). Bedford originally offered the entire building, but when it subsequently reduced the proposed rental it also reduced the footage and believed that one or two floors would be left over which it could rent for additional income. Although Bedford and GSA were substantially in agreement as to the measurements of the building, they did not agree as to the square footage to be rented because of their disagreement as to the applicability of the corridor deduction factor. The issue of the applicability of the corridor deduction factor was never resolved. Finally, Bedford and

GSA did not at any time reach an agreement as to the rate to be charged for overtime services, an expense which, in the several years prior to and including 1975, amounted to some $90,000 per year, a substantial sum.

Because Bedford reasonably believed that the terms of the proposed lease would be further negotiated after an award, and because there was no meeting of the minds as to a number of essential items, no contract was made.

B. *Enforceability*

Even assuming a contract to lease the building was entered into, Bedford argues that the contract was rendered unenforceable because of the Government's misconduct during the negotiations. Specifically, Bedford contends that the contract is unenforceable on grounds of unconscionability, duress and misrepresentation.

Section 2-302(1) of the Uniform Commercial Code provides:

> If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract. . . .

The basic test of unconscionability is "whether, in the light of the general commercial background and the commercial needs of the particular trade or case, the clauses involved are so one-sided as to be unconscionable under the circumstances existing at the time of the making of the contract. . . . The principle is one of the prevention of oppression and unfair surprise." *Id.* Official Comment 1. The concept of unconscionability was developed "to prevent the unjust enforcement of onerous contractual terms which one party is able to impose [on] the other because of a significant disparity in bargaining

power." *Rowe v. Great Atlantic & Pacific Tea Co.*, 46 N.Y.2d 62, 68, 385 N.E.2d 566, 569, 412 N.Y.S.2d 827, 830 (1978) (citation omitted). *See also* N.Y.R.P.L. § 235-c (McKinney Supp. 1979-1980) (provision virtually identical to UCC § 2-302 applicable to unconscionable leases). It must be kept in mind, of course, that "[a]bsent some violation of law or transgression of a strong public policy, the parties to a contract are basically free to make whatever agreement they wish, no matter how unwise it might appear to a third party." *Rowe v. Great Atlantic & Pacific Tea Co.*, 46 N.Y.2d at 67-68, 385 N.E.2d at 569, 412 N.Y.S.2d at 830. *See also George Backer Management Corp. v. Acme Quilting Co.*, 46 N.Y.2d 211, 218, 385 N.E. 2d 1062, 1065, 413 N.Y.S.2d 135, 138 (1978) ("Once a contract is made, only in unusual circumstances will a court relieve the parties of the duty of abiding by it.").

[4] The alleged new lease and the manner in which it was negotiated by GSA are in my opinion unconscionable. The terms of the alleged new lease are unreasonably weighted in favor of the Government, and they are so one-sided as to render the alleged new lease unconscionable. The fact that the only other two offers to respond to the Solicitation called for much higher rents and the fact that GSA's SLUC rate was approximately $13.00 per square foot when the composite rental under the alleged new lease using the Government's footage figure was only $916 bear this conclusion out. Moreover, the $9.16 figure was based on the full new lease rent; since the alterations called for under the alleged lease had not yet been made, the rent actually received under the alleged lease until the completion of construction would have been much less and the burden of Bedford even greater. The one-sidedness of the alleged new lease was primarily the result of the Government's delays. Bedford submitted its bid in August 1977 and expected an award by late 1977 or early

1978. GSA did in fact decide to recommend Bedford's offer by November 1977. A draft prospectus was sent to Washington in December 1977, but the final prospectus was not sent until June of 1978. No satisfactory explanation was provided by the Government for this delay. Although the Government's time in which to accept Bedford's offer would have expired in April 1978, Bedford granted several of GSA's requests for extensions and extended the time until October 30, 1978. These delays caused a substantial increase in construction costs and a substantial decrease in rental income to Bedford.

The alleged new lease is also unconscionable because of the manner in which the Government conducted its negotiations. GSA did not negotiate in good faith. It misrepresented the extent of Bedford's competition. Even though the other two offers were not competitive, GSA misled Bedford into believing there was strong competition. Even after the Prudential representatives had asked to be notified as to when they could be released from Prudential's offer, GSA was referred to "other offers" in its negotiations with Bedford. GSA convinced Bedford to offer new ceilings even though new ceilings were not called for in the Solicitation by telling Bedford that the other offerors were offering new ceilings. This disclosure violated the Government's own regulations. *See* DX 248 ch. 3-18, at 24; 41 C.F.R. § 1-3.805-1. GSA also told Bedford the Government would not consider offers net of utilities, even though the other two offers were net and substantially net of utilities. In addition, in the course of negotiations GSA told Bedford its offer had "fat" in it even though GSA knew that Bedford was underestimating its expenses.

[5] Knowing that exercising the second renewal option would be financially disastrous to Bedford, GSA continually threatened to exercise the option even though the

Government did not intend to do so. Although it may be generally true that threatening to exercise a legal right does not constitute duress, *see, e. g., Business Incentives Co.* v. *Sony Corp.*, 397 F.Supp. 63, 69 (S.D.N.Y.1975), such action may constitute duress if the threat is made primarily to coerce someone into doing something he otherwise would not do. *See, e. g., Laemmar* v. *J. Walter Thompson Co.*, 435 F.2d 680, 682 (7th Cir. 1970). In the instant case, first of all, the Government's right to exercise the second option expired on or about May 1, 1978, for the 1973 amendments to the 1962 lease applied only to the notice requirement for the first renewal option. Hence, after May 1, 1978, the Government no longer had a legal right to exercise the second option. In any event, even assuming it did have a legal right to exercise the second renewal, it is clear that it did not intend to do so and that it threatened to do so only to coerce Bedford into coming up with a more favorable offer and into giving the Government more time.

GSA also misled Bedford into believing that the terms of the proposed lease were open to further negotiations after an award was made. GSA's statements to Bedford to the effect that negotiations were "closed" were ambiguous and were contradicted by other GSA statements. It is clear that Bedford would not have acted as it did had it known that the Government was going to subsequently refuse to further negotiate after an award. By failing to give advance written notice of the purported termination of negotiations, GSA violated its own regulations. Moreover, GSA told Bedford it would consider the latter's exchange proposal after an award was made even though it had privately decided to reject the proposal.

GSA's conduct went beyond "hard bargaining in the interest of the Government." *See Johnson, Drake & Piper, Inc.* v. *United States*, 531 F.2d 1037, 1043, 209

Ct.Cl. 313 (1976). By misrepresenting the extent of competition, by threatening in bad faith to exercise the second option, by misleading Bedford as to the availability of further negotiations, and by engaging in other wrongful acts, the Government placed Bedford in an extremely precarious position financially and deprived Bedford of any real choice of action. Under these circumstances, the Government's conduct constituted duress. The Government's wrongful actions during the negotiations taken in conjunction with the one-sidedness of the terms of the alleged new lease render the alleged new lease unconscionable and therefore unenforceable.

In light of my holdings that no lease was made and that even assuming a lease was made it is unenforceable, Bedford is not liable to the Government for damages. Since there was no valid lease, there could not have been a breach of any lease.

C. *Bowery's Mortgage*

[6] Bowery's first mortgage on 120 Church Street is dated December 16, 1963 and has been modified, extended and consolidated by a series of mortgage agreements, the last one dated August 1, 1975. The mortgage is a valid one, and has been and is in default. It would appear, therefore, that Bowery is entitled to a judgment foreclosing its mortgage. *Ferlazzo* v. *Riley,* 278 N.Y. 289, 16 N.E.2d 286 (1938); *Broadway Savings Bank* v. *Rosenblat,* 32 App.Div.2d 773, 201 N.Y.S.2d 162 (1st Dep't 1969); *Jamaica Savings Bank* v. *Cohan,* 36 App.Div.2d 743, 320 N.Y.S.2d 471 (2d Dep't 1971).[9] The only de-

[9] There does not appear to be any dispute that New York law is applicable, for all the parties have relied on and cited to New York law.

fenses asserted by Bedford to Bowery's foreclosure action are laches and lack of subject matter jurisdiction. The laches argument must be rejected, for in a foreclosure proceeding "the doctrine of laches is not available as a defense so long as the statutory period allowed for the commencement of foreclosure has not expired." *Wesselman* v. *Engel Co.*, 309 N.Y. 27, 32, 127 N.E.2d 736, 739 (1955) (Dye, J., dissenting in part); *accord*, *Riordan* v. *Ferguson*, 147 F.2d 983 (2d Cir. 1945). The statute of limitations in New York for the commencement of a foreclosure action is six years. N.Y.C.P.L.R. § 213(4) (McKinney 1972). Bowery filed its suit in March 1979, some three months following Bedford's default. The lack of subject matter jurisdiction claim is also rejected, for the reasons stated in my opinion of March 18, 1980 denying the Government's motion to dismiss.

The Government's original lease expired on October 31, 1978, and the IRS is in possession of the building pursuant to a claimed leasehold interest under the alleged new lease which purportedly commenced on November 1, 1978. Since I have concluded that no valid lease was made, the Government is in possession only as a holdover tenant. Whether the Government is in possession only as a holdover or whether it is assumed a new lease was made, Bowery is entitled to a judgment of foreclosure.

[7-10] Under New York law, a lease entered into after the premises has been subjected to a mortgage is subordinate to the mortgage. *220 West 42 Associates* v. *Ronbet Newmark Co.*, 84 Misc.2d 259, 261 62, 375 N.Y.S.2d 255, 258-59 (Sup.Ct.N.Y.Co.1975), *modified*, 53 App.Div.2d 829, 385 N.Y.S.2d 304 (1st Dep't), *aff'd* 40 N.Y.2d 1000, 359 N.E.2d 701, 391 N.Y.S.2d 107 (1976). Where a subordinate lessee has been named as a party in a foreclosure action, a judgment of foreclosure will terminate the lessee's

right to a leasehold. *United Security Corp.* v. *Suchman*, 307 N.Y. 48, 52, 119 N.E.2d 881, 882 (1954); *127 Korea House, Inv.* v. *House of Korea, Inc.*, 49 App.Div.2d 736, 736-37, 372 N.Y.S.2d 679, 680 (1st Dep't 1975). A holdover tenancy is a new tenancy, not a continuation of the old one, and is created at the moment the prior lease expires, *Kennedy* v. *City of New York*, 196 N.Y. 19, 23-25, 89 N.E. 360, 361-62 (1909); *Brooklyn Dock & Terminal Co.* v. *Bahrenburg*, 135 App.Div. 799, 802, 120 N.Y.S. 205, 207 (2d Dep't 1909), *aff'd*, 202 N.Y. 521, 95 N.E. 1123 (1911); hence, the interests of a party in possession solely as a statutory month-to-month tenant are also cut off when a prior mortgage of the premises is foreclosed. *Empire Savings Bank* v. *Towers Co.*, 54 App.Div.2d 574, 387 N.Y. S.2d 138, 139 (2d Dep't 1976). Since the Government's interest in the building is subordinate to Bowery's mortgage and since the Government has been named as a defendant, its interest will be cut off by a judgment of foreclosure.

The Government, however, contends that Bowery is not entitled to foreclose the Government's interests in the premises and has raised a number of affirmative defenses: equitable estoppel, unreasonable withholding of approval, unclean hands and waiver.

(1) Equitable Estoppel

[11] The elements of equitable estoppel fall into two categories: those that relate to the party sought to be estopped, and those that relate to the party asserting the estoppel. The essential elements relating to the party to be estopped are: (1) conduct which amounts to a false representation or concealment of material facts or which gives the impression that the facts are otherwise than as asserted, (2) intention or expectation that such conduct would be relied upon by the other party, and (3) actual or

constructive knowledge of the real facts. The elements relating to the party asserting the estoppel are: (1) lack of knowledge and the means of acquiring knowledge of the real facts, (2) reliance on the conduct of the party to be estopped, and (3) action based thereon resulting in a prejudicial change of position. *State Bank of Albany* v. *Fioravanti,* 70 App.Div.2d 1011, 1012-13, 418 N.Y.S.2d 202, 203-04 (3d Dep't 1979), *quoting New York State Guernsey Breeders' Co-operative, Inc.* v. *Noyes,* 260 App.Div. 240, 248, 22 N.Y.S.2d 132, 140 (3d Dep't), *modified,* 284 N.Y. 197, 30 N.E.2d 471 (1940).

[12, 13] Since equitable estoppel is an affirmative defense, the Government has the burden of establishing its elements. *Bush* v. *Remington Rand, Inc.,* 213 F.2d 456, 461 (2d Cir.), *cert. denied,* 348 U.S. 861, 75 S.Ct. 85, 99 L.Ed. 679 (1954). The Government contends that Bowery concealed the facts (1) that the mortgage contained a provision giving the Bowery the right to approve any new lease and (2) that it would not accept a lease based on the terms of Bedford's bid.

The record does not support the Government's contentions. The original mortgage and the modification agreements were all publicly recorded documents. GSA knew at least as early as 1972 of the existence of the Bowery's mortgage, and in 1975 Carl Madonick specifically told GSA of Bowery's right of approval. Hence, GSA had actual knowledge of the existence of the approval provision, and even assuming that it did not have this knowledge, it certainly had the means of ascertaining the provisions of the publicly recorded mortgage. *See World of Food, Inc.* v. *N. Y. World's Fair 1964-65 Corp.,* 22 App. Div.2d 278, 281, 254 N.Y.S.2d 658, 662 (1st Dep't 1964) (no estoppel where lessee had "means of acquiring knowledge"). In addition, the record is equally clear that Bowery did not conceal the "fact" that it would not accept

a lease based on Bedford's bid. This was simply not a fact. Although Bowery personnel had preliminarily concluded on the basis of the information available to the bank that the proposed lease was not acceptable, these conclusions were only preliminary ones based on what the bank personnel believed to be preliminary information. Bowery was under the impression that the proposed terms were going to be further negotiated. The bank did not even see a copy of the proposed lease until January of 1979. As I have found above, no lease was ever agreed to; accordingly, Bowery could not have considered and rejected a "lease" and it therefore could not have concealed something that it did not do. Since Bowery did not conceal any material facts or otherwise create any misleading impressions, it did not intend or expect the Government to rely on such conduct.

Bowery was not a party to the lease negotiations; it therefore had no "duty to speak" and no obligation to inject itself into the negotiations. Indeed, had it done so, it might have left itself open to a suit for tortious interference with contract. The Government's reliance on section 291-f of the Real Property Law, N.Y.R.P.L. § 291-f (McKinney 1968), is misplaced. That section applies to agreements between mortgagors and mortgagees that "cancel, abridge or otherwise modify tenancies, subtenancies, leases or subleases of the mortgaged real property *in existence at the time of the agreement*. . . ." (Emphasis added). The agreement between Bedford and Bowery providing for the bank's right of approval did not abridge or otherwise modify the existing 1962 lease; the agreement applied only to any new lease between Bedford and the Government.

The Government has also failed to show that it relied on Bowery's alleged misconduct. The Government introduced no evidence that it acted as it did because of Bowery's alleged misconduct. GSA would not have exercised the

second option even if it had known that Bowery was not going to approve the proposed lease. The evidence demonstrates that the Government had no intention of exercising the second option, and that the threats to exercise the option were made only to strengthen the Government's bargaining power. Even assuming that the Government did not know of the existence of the approval clause in the mortgage and even assuming that the Bowery concealed this existence, the Government presented no evidence that it would have acted differently but for this alleged concealment.

The Government equitable estoppel defense is rejected.

(2) Unreasonable Withholding of Approval

[14] The approval clause of the mortgage, as amended, provided that Bowery's approval was not to be unreasonably withheld. The Government contends that because the terms of the proposed lease were more favorable than the terms of the second renewal option, any withholding of approval would have been unreasonable.

This defense must also be rejected. First, as noted above, the Bank did not withhold approval; it was never asked for approval and did not see a copy of the proposed lease until January 1979, after Bedford had itself rejected it. Second, although the terms of the proposed lease may indeed have been more favorable than the terms of the second renewal option, Bowerey would not at all have acted unreasonably in refusing to give approval. The alleged new lease wass a losing proposition for Bedford and the proposed rental was well below the fair market rental value of the building. It certainly would not have been unreasonable of Bowery to withhold approval; indeed, it would have been unreasonable for Bowery to have done otherwise.

Appendix B

(3) Unclean Hands

[15, 16] The Government contends that Bowery is not entitled to foreclosure because of the doctrine of unclean hands. The Government points out that foreclosure is an equitable remedy, and argues that Bowery acted in bad faith by concealing the fact that it had decided to reject the proposed lease, waiting for the Government's right to exercise the second renewal option to expire. This defense must be rejected for the same reasons the first two defenses were rejected. Bowery was not presented with a proposed lease to approve; it had only drawn preliminary conclusions on the basis of what it believed to be preliminary information. I can find no bad faith on the part of the bank or its employees. Additionally, under New York law, the doctrine of unclean hands is not a defense to a foreclosure action. *Jo Ann Homes at Bellmore, Inc.* v. *Dworetz*, 25 N.Y.2d 112, 122, 250 N.E.2d 214, 219, 302 N.Y.S.2d 799, 806 (1969).

(4) Waiver

[17, 18] A waiver is an intentional or voluntary relinquishment or abandonment of a known right. *Metro-Goldwyn-Mayer, Inc.* v. *Ross*, 509 F.2d 930, 933 n. 3 (2d Cir. 1975); *City of New York* v. *State*, 40 N.Y.2d 659, 669, 357 N.E.2d 988, 995, 389 N.Y.S.2d 332, 340 (1976). The record does not support the conclusion that Bowery voluntarily or intentionally relinquished or abandoned its right to approve a new lease or its right to foreclose in the event of a default.

The Government having failed to establish any of its affirmative defenses, Bowery's mortgage will be foreclosed.

Appendix B

D. *Valuation*

[19] Section 2409a(b) of Title 28 of the United States Code provides:

> The United States shall not be disturbed in possession or control of any real property involved in any action under this section pending a final judgment or decree, the conclusion of any appeal therefrom, and sixty days; and if the final determination shall be adverse to the United States, the United States nevertheless may retain such possession or control of the real property or of any part thereof as it may elect, upon payment to the person determined to be entitled thereto of an amount which upon such election the district court in the same action shall determine to be just compensation for such possession or control.

"Just compensation" is to be determined by ascertaining the fair market value of the property at the time of the Government's "taking" of the property, for the owner is entitled to receive the "full monetary equivalent" of the property at the time of taking. *See Almota Farmers Elevator & Warehouse Co.* v. *United States,* 409 U.S. 470, 473-74, 93 S.Ct. 791, 794, 35 L.Ed.2d 1 (1973).

(1) Date of Valuation

The Government argues that the property in question should be valued as of November 1, 1978, the date the lease expired and holdover statute commenced, while Bowery, on the other hand, contends just compensation should be determined by the property's present fair market value.

I agree with Bowery that valuation should be determined as of the present. The cases relied on by the Government, *United States* v. *Dow,* 357 U.S. 17, 78 S.Ct. 1039, 2 L.Ed.2d

1109 (1958); *United States* v. *Drinkwater*, 434 F.Supp. 457 (E.D.Va. 1977); *United States* v. *Herrero*, 416 F.2d 945 (9th Cir. 1969), *cert. denied*, 397 U.S. 973, 90 S.Ct. 1090, 25 L.Ed.2d 267 (1970), are distinguishable from the situation at hand. In *Dow* the United States entered into possession of a piece of property in 1943 pursuant to a condemnation petition and court order. Although the Government did not file a "declaration of taking" until 1946, the Supreme Court held that the "taking" occurred in 1943. The landowners in *Drinkwater* claimed that the Government had engaged in an unconstitutional taking of their property, and the court ruled that just compensation was to be determined by the value of the property at the time the Government took possession. In *Herrero*, although the Government was originally in possession of the property in question pursuant to a lease, when that lease expired the Government effectively seized the property and "[t]he owners were completely and permanently excluded from enpoyment." *United States* v. *Herrero*, 416 F.2d at 947. The court therefore held hat the "taking" occurred when the lease expired. In each of these cases, then, the Government by its actions made it clear that it was in fact "taking" the property through its exercise of its powers of eminent domain.

[20, 21] In the instant case, the Government did not manifest any intent to exercise its powers of eminent domain. On the contrary, the Government remained in possession after October 31, 1978 pursuant to what it alleged was a valid and binding leasing contract, and has "disavow[ed] use of its eminent domain power with respect to the 120 Church Street building." *United States* v. *Bedford Associates*, 618 F.2d 904, at 918 n. 28 (2d Cir. 1980). There is no "taking" of property until the Government has "definitely asserted" its "intent to take." *Gerlach Livestock Co.* v. *United States*, 76 F.Supp. 87, 97

(Ct.Cl.1948), *aff'd*, 339 U.S. 725, 70 S.Ct. 955, 94 L.Ed. 1231 (1950); *see also Calvo* v. *United States*, 303 F.2d 902 (9th Cir. 1962) (although Government remained in possession following termination of lease, its conduct did not amount to a "taking"; "taking" therefore did not occur until subsequent filing of declaration of taking). The Government has not, either by its words or actions, definitely asserted an intent to take. The "taking" therefore will not occur until the Government remains in possession following a judicial determination that it is not legally entitled to possession. Valuation will therefore be determined as of the present time.

(2) Fair Market Value

[22] At trial, each of the parties called an expert witness to testify concerning the value of the premises: Alan J. Greenstein testified for the Government, James Peel for Bowery, and Carl Madonick on behalf of Bedford. On the basis of their reports and testimony and other evidence introduced at trial, my findings with respect to value are: (1) the present fair market rental value is $4,533,350.00 per annum, based on an average square foot rate of $12.77 per square foot for 355,000 square feet of rentable area, with the tenant paying utilities, (2) the present fair market value of the premises is $20,000,000, and (3) the fair market rental value as of November 1, 1978 was $3,280,200 per annum, based on an average square foot rate of $9.24 per square foot for 355,000 square feet of rentable area, with the tenant paying utilities.

The 355,000 square footage figure is based on Greenstein's appraisal. He testified that he personally measured the floor plans of the building. His figure is consistent with GX 527, which is the tabulation of the net usable space in the building reviewed by GSA and Bedford when

they met in January 1978 for the purpose of ascertaining square footage: that exhibit contains the entry 356,822.7 with the notation "RENTAL AREA; NOT DEDUCTING FOR CORRIDORS." At that meeting, GSA and Bedford were in substantial agreement as to the measurements of the building. The present fair market rental rate of $12.77 per square foot is based on Peel's report ,and is consistent with GSA's SLUC rate of approximately $13.00 per square foot.

CONCLUSION

In accordance with the above, I hold that the Government has been in possession of 120 Church Street since November 1, 1978 solely as a holdover tenant with no contractual leasehold interest. The Government's complaint against Bedford is dismissed, and judgment is rendered for Bedford. Bedford is entitled to receive from the Government the difference between the rent it actually received and the fair market rental value of the premises as of November 1, 1978, with the Government responsible for all utilities. In the bank's action, judgment is rendered for Bowery for the relief requested in the first and second claims of the complaint. The Government is directed to pay to the Bowery, as of June 1, 1980, the present fair rental market value of the premises for continued possession. Bedford's counterclaim against Bowery is hereby dismissed. The parties are to make whatever adjustments are necessary to account for the assignment of rents to the Bowery pursuant to the preliminary injunction filed April 17, 1979 and amended on remand.

Submit judgment on notice within 10 days after the date of this opinion.

SO ORDERED.

Appendix C—Opinion of the United States District Court on Subject Matter Jurisdiction.

UNITED STATES of America, Plaintiff,

v.

BEDFORD ASSOCIATES, a partnership, Doris K. Carver and Samuel Ades, Individually and as partners of Bedford Associates, and Amcar Management Corp., Defendants.

The BOWERY SAVINGS BANK,
Plaintiff,

v.

BEDFORD ASSOCIATES, a partnership, Doris K. Carver and Samuel Ades, Individually and as partners of Bedford Associates, and United States of America, Defendants.

Nos. 79 Civ. 1522, 19 Civ. 1482 (HFW).

United States District Court,
S. D. New York.

March 18, 1980.

OPINION

HENRY F. WERKER, District Judge.

The United States has moved to dismiss the Bowery's complaint for lack of subject matter jurisdiction pursuant to Rule 12(b)(1). The only issue raised by the motion is whether the Bowery's complaint falls within the ambit of 28 U.S.C. § 2409a. For the reasons that follow, the motion is denied.

Section 2409a provides in pertinent part:

> (a) The United States may be named as a party defendant in a civil action under this section to adjudicate a disputed title to real property in which the United States claims an interest, other than a security interest or water rights.

Appendix C

The Bowery's complaint alleges that the United States claims a leasehold interest in the premises in question, that no such leasehold interest in fact exists, and that even if it is found that such a leasehold interest does exist, the United States' interest is subject and subordinate to the Bowery's mortgage.[1] The first claim of Bowery's complaint seeks a declaratory judgment as to what interest, if any, the United States has in the premises and as to what effect foreclosure would have on that interest. The second claim seeks to foreclose Bowery's mortgage, and the third claim seeks an assignment of rents.

In moving to dismiss, the United States relies on the language in the statute which limits its coverage to actions "to adjudicate a disputed title," and argues that the Bowery's action cannot be one to adjudicate a "disputed title" since the title is not in dispute. The United States contends further than the Bowery's action "is on its face a garden variety, mortgagee-mortgagor action for foreclosure" which does not fall within the ambit of section 2409a.

Although the second claim of the complaint does indeed seek foreclosure, the Bowery's suit is certainly not a "garden variety" foreclosure action. The dispute concerning the existence and nature of the United States' alleged leasehold interest has created a very real cloud on the title of the property. For example, if it is found that the Bowery's mortgage is subordinate to the United States' alleged leasehold interest, the Bowery may not be entitled to possession of the property—or just compensation—even if it is successful in its efforts to foreclose. The Bowery's suit seeks a judgment quieting the cloud on

---

[1] The facts are set forth in the second circuit's opinion and thus need not be repeated here. *United States* v. *Bedford Associates*, 618 F.2d 904, (2d Cir. 1980).

the title to the property and an adjudication of the respective rights of the parties involved.

Under New York law, the Bowery's first claim would undoubtedly be considered to be in the nature of an action to quiet title or, as such actions are known in New York, an action to compel the determination of a claim to real property. N.Y.R.P.A.P.L. § 1501 *et seq.* (McKinney 1979). The legislative history of section 2409a indicates that state law should be looked to where a question is not covered by federal law. *See* Executive communication of the Attorney General, referred to in H.R.Rep. No. 92-1559, 92d Cong., 2d Sess., reprinted in [1972] U.S.Code Cong. & Admin.News, pp. 4547, 4555 ("The State law of real property would of course apply to decide all questions not covered by Federal law."). *Accord, Kinschherff* v. *United States.* 586 F.2d 159, 160 (10th Cir. 1978) ("It thus must be assumed that Congress intended to permit to be brought against the United States the typical quiet title suit, as it has developed in the various states in this country through statutory and case law."). Since the federal statute is silent as to the definition of an "action to quiet title," New York law is to be turned to for guidance.

The relevant New York statute is Article 15 of the Real Property Actions and Proceedings Law. Section 1501(1) thereof provides that [w]here a person claims an estate or interest in real property . . . [he] may maintain an action against any other person . . . to compel the determination of any claim adverse to that of the plaintiff which the defendant makes . . ." N.Y.R.P.A.P.L. § 1501(1) (McKinney 1979). The Bowery, as the first mortgagee, certainly has an "interest" in the property in question. *See id.* § 1501(5). Moreover, the United States' claimed leaseshold interest is certainly "adverse to that of the plaintiff." *See, e. g., Newport Associates, Inc.* v. *Solow,* 30 N.Y.2d 263, 283 N.E.2d 600, 332 N.Y.S.2d 617 (1972),

cert. denied, 410 U.S. 931, 93 S.Ct. 1372, 35 L.Ed.2d 593 (1973) (Article 15 proceeding brought against holder of a leasehold interest). Hence, had the Bowery commenced this action in state court, it would have been governed by Article 15 as an action to compel the determination of a claim adverse to the Bowery's interest. The New York cases have also permitted a person with an interest in real property to bring an action to quiet title against a purported tenant or someone else in possession who claims a leasehold interest in the property. *See, e. g., Nickerson* v. *Canton, Marble Co.,* 35 App.Div. 111, 54 N.Y.S. 705 (3d Dep't 1898); *S. H. Kress & Co.* v. *Fine,* 25 Misc.2d 500, 202 N.Y.S.2d 368 (Sup.Ct.N.Y.Co.1960); *Law Center Inc.* v. *Trust Co. of North America,* 84 N.Y.S.2d 577 (Sup.Ct.N.Y.Co.1948).

Section 2409a is labelled "Real property quiet title actions." There can be no question that it is intended to provide citizens with a means by which to join the United States in actions to quiet title involving real property in which the United States claims an interest. *See* H.R.Rep. No. 92-1559, 92d Cong., 2d Sess., reprinted in [1972] U.S.Code Cong. & Admin.News, p. 4547. Subsection (b) of section 2409a provides that in the event an action brought under that section results in a final determination adverse to the United States, the United States may elect to remain in possession upon the payment of just compensation.

In the instant case, the United States claims an interest in the property in question. The Bowery's action is at least in part an action to quiet the cloud on that property. It is clear, then, that the Court has subject matter jurisdiction over this matter pursuant to section 2409a. Should this proceeding result in a final determination that the United States had no enforceable lease, and if such a determination is upheld on appeal, the United States will be required to choose between vacating the premises or

remaining in possession and paying just compensation. 28 U.S.C. § 2409a(b).

The United States argues that even if the Court does have subject matter jurisdiction under section 2409a over the Bowery's first claim, the Court does not have subject matter jurisdiction over the Bowery's foreclosure claim against the owners of the property. I disagree.

Section 1346(f) of Title 28 of the United States Code vests the district courts with the exclusive original jurisdiction over actions brought under section 2409a. The Supreme Court has specifically cited section 1346 as an example of a situation where concerns of judicial economy and convenience coupled with the grant of exclusive jurisdiction warrant trying all claims in one district court proceeding, including claims against parties with respect to whom there is no independent basis for federal jurisdiction. *Aldinger* v. *Howard,* 427 U.S. 1, 18, 96 S.Ct. 2413, 1422, 49 L.Ed.2d 276 (1976). These concerns are particularly compelling in the instant case because of the fact the United States' suit against the owners of the building is pending in this Court. To require the Bowery to prosecute its foreclosure claim in state court when the owners and the United States are litigating their dispute in this Court would be extremely inefficient and wasteful. Since I am satisfied that Congress "has not expressly or by implication negated" the existence of jurisdiction in a situation such as this, I hold that pendent party jurisdiction can and should be exercised over the Bowery's claims against the owners of the property in question. *Aldinger* v. *Howard,* 427 U.S. at 18, 96 S.Ct. at 2413. *See Maltais* v. *United States,* 439 F.Supp. 540 (N.D.N.Y.1977) (held, court has power to entertain claims against pendent parties in an action brought against the United States under the Federal Tort Claims Act).

In accordance with the above, the motion to dismiss the Bowery's complaint is denied in all respects.

So ordered.

Appendix D—Order of Court of Appeals.

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the thirty-first day of March one thousand nine hundred and eighty-one.

Present: HON. LEONARD P. MOORE
HON. WILLIAM H. MULLIGAN
HON. AMALYA L. KEARSE
Circuit Judges,

#80-6105
#80-6107

United States Court of Appeals
Filed
May 31 1981
A. Daniel Fusaro, Clerk
Second Circuit

UNITED STATES OF AMERICA,

Plaintiff-Appellant,

v.

BEDFORD ASSOCIATES, a Partnership, DORIS K. CARVER and SAMUEL ADES, individually and as partners of Bedford Associates, and AMCAR MANAGEMENT CORP.,

Defendants-Appellees,

and

THE BOWERY SAVINGS BANK,

Intervenor-Appellee.

Appendix D

THE BOWERY SAVINGS BANK,

Plaintiff-Appellee,

v.

BEDFORD ASSOCIATES, a Partnership, DORIS K. CARVER and SAMUELS ADES, individually and as partners of BEDFORD ASSOCIATES,

Defendants-Appellees,

and

UNITED STATES OF AMERICA,

Defendant-Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgments of said District Court be and it hereby is affirmed in part, reversed in part and the action be and it hereby is remanded to said district court for furher proceedings without costs in accordance with the opinion of this court.

Appendix D

A True Copy
A. DANIEL FUSARO, Clerk
By FRANCIS X. GUIDHART
Chief Deputy Clerk

A. DANIEL FUSARO, Clerk
ARTHUR HELLER

by Arthur Heller, Deputy Clerk
Judgment Entered 10/19/81
RAYMOND F. BURGHARDT, Clerk

Appendix E—Order of Court of Appeals Denying Denying Rehearing and Suggestion for Rehearing *En Banc.*

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States tCourhouse, in the City of New York, on the 8th day of October, one thousand nine hundred and eighty-one.

Nos. 80-6105
80-6107

UNITED STATES COURT OF APPEALS
Filed
Oct 8 1981
A. Daniel Fusaro, Clerk
Second Circuit

UNITED STATES OF AMERICA,

Plaintiff-Appellant,

v.

BEDFORD ASSOCIATES, a Partnership, DORIS K. CARVER and SAMUEL ADES, individually and as partners of Bedford Associates, and AMCAR MANAGEMENT CORP.,

Defendants-Appellees,

and

THE BOWERY SAVINGS BANK,

Intervenor-Appellee.

Appendix E

THE BOWERY SAVINGS BANK,

Plaintiff-Appellee,

v.

BEDFORD ASSOCIATES, a Partnership, DORIS K. CARVER and SAMUELS ADES, individually and as partners of BEDFORD ASSOCIATES,

Defendants-Appellees,

and

UNITED STATES OF AMERICA,

Defendant-Appellant.

Petitions for rehearing containing suggestions that the action be reheard in banc having been filed herein by counsel for the appellant, United States of America, and by counsel for appellees, Bedford Associates, Doris K. Carver, Samuel Ades and Amcar Management Corporation,

Upon consideration by the panel* that heard the appeal, it is

ORDERED that said petitions for rehearing are DENIED.

It is further noted that the suggestions for rehearing in banc have been transmitted to the judges of the court in regular active service and to any other judge on the panel that heard the appeal and that no such judge has requested that a vote be taken thereon.

A. DANIEL FUSARO
A. Daniel Fusaro
Clerk
by FRANCIS X. GUIDHART
Chief Deputy Clerk

Appendix F—Section 7 of the Public Buildings Act of 1959, as Amended, 40 U.S.C. § 606 (1980).

§ 606. Approval of proposed projects by Congress—Limitation of funds; transmission to Congress of prospectus of proposed project

(a) In order to insure the equitable distribution of public buildings throughout the United States with due regard for the comparative urgency of need for such buildings, except as provided in section 603 of this title, no appropriation shall be made to construct, alter, purchase, or to acquire any building to be used as a public building which involves a total expenditure in excess of $500,000 if such construction, alteration, purchase, or acquisition has not been approved by resolutions adopted by the Committee on Public Works of the Senate and House of Representatives, respectively. No appropriation shall be made to lease any space at an average annual rental in excess of $500,000 for use for public purposes if such lease has not been approved by resolutions adopted by the Committee on Public Works of the Senate and House of Representatives, respectively. For the purpose of securing consideration for such approval, the Administrator shall transmit to the Congress a prospectus of the proposed facility, including (but not limited to)—

(1) a brief description of the building to be constructed, altered, purchased, acquired, or the space to be leased under this chapter;

(2) the location of the building or space to be leased and an estimate of the maximum cost to the United States of the facility to be constructed, altered, purchased, acquired, or the space to be leased;

(3) a comprehensive plan for providing space for all Government officers and employees in the locality

of the proposed facility or the space to be leased, having due regard for suitable space which may continue to be available in existing Government-owned or occupied buildings, especially such of those buildings as enhance the architectural, historical, social, cultural, and economic environment of the locality;

(4) with respect to any project for the construction, alteration, purchase, or acquisition of any building, a statement by the Administrator that suitable space owned by the Government is not available and that suitable rental space is not available at a price commensurate with that to be afforded through the proposed action;

(5) a statement by the Administrator of the economic and other justifications for not acquiring or purchasing a building or buildings identified to the Administrator pursuant to section 611(c) of this title as suitable for the public building needs of the Federal Government; and

(6) a statement of rents and other housing costs currently being paid by the Government for Federal agencies to be housed in the building to be constructed, altered, purchased, acquired, or the space to be leased.

Increase of estimated maximum cost

(b) The estimated maximum cost of any project approved under this section as set forth in any prospectus may be increased by an amount equal to the percentage increase, if any, as determined by the Administrator, in construction or alteration costs, as the case may be, from the date of transmittal of such prospectus to Congress, but in no event shall the increase authorized by this subsecution exceed 10 percentum of such estimated maximum cost.

Appendix F

Rescission of approval for failure to make appropriations for project

(c) In the case of any project approved for construction, alteration, or acquisition by the Committees on Public Works of the Senate and of the House of Representatives, respectively, in accordance with subsection (a) of this section, for which an appropriation has not been made within one year after the date of such approval, either the Committee on Public Works of the Senate or the Committee on Public Works of the House of Representatives, may rescind, by resolution, its approval of such project at any time thereafter before such an appropriate has been made.

Emergency leases by the Administrator

(d) Nothing in this section shall be construed to prevent the Administrator from entering into emergency leases during any period declared by the President to require such emergency leasing authority, except that no such emergency lease shall be for a period of more than 180 days without approval of a prospectus for such lease in accordance with subsection (a) of this section.

As amended Pub.L 92-313, § 2(4), June 16, 1972, 86 Stat. 217; Pub.L. 94-541, Title I §§103(1), (2), Oct. 18, 1976, 90 Stat. 2505.

Appendix G—28 U.S.C. § 2409a Real Property Quiet Title Actions.

§ 2409a. Real property quiet title actions

(a) The United States may be named as a party defendant in a civil action under this section to adjudicate a disputed title to real property in which the United States claims an interest, other than a security interest or water rights. This section does not apply to trust or restricted Indian lands, nor does it apply to or affect actions which may be or could have been brought under sections 1346, 1347, 1491, or 2410 of this title, sections 7424, 7425, or 7426 of the Internal Revenue Code of 1954, as amended (26 U.S.C. 7424, 7425, and 7426), or section 208 of the Act of July 10, 1952 (43 U.S.C. 666).

(b) The United States shall not be disturbed in possession or control of any real property involved in any action under this section pending a final judgment or decree, the conclusion of any appeal therefrom, and sixty days; and if the final determination shall be adverse to the United States, the United States nevertheless may retain such possession or control of the real property or of any part thereof as it may elect, upon payment to the person determined to be entitled thereto of an amount which upon such election the district court in the same action shall determine to be just compensation for such possession or control.

(c) The complaint shall set forth with particularity the nature of the right, title, or interest which the plaintiff claims in the real property, the circumstances under which it was acquired, and the right, title, or interest claimed by the United States.

(d) If the United States disclaims all interest in the real property or interest therein adverse to the plaintiff at

any time prior to the actual commencement of the trial, which disclaimer is confirmed by order of the court, the jurisdiction of the district court shall cease unless it has jurisdiction of the civil action or suit on ground other than and independent of the authority conferred by section 1346(f) of this title.

(e) A civil action against the United States under this section shall be tried by the court without a jury.

(f) Any civil action under this section shall be barred unless it is commenced within twelve years of the date upon which it accrued. Suh action shall be deemed to have accured on the date the plaintiff or his predecessor in interest knew or should have known of the claim of the United States.

(g) Nothing in this section shall be construed to permit suits against the United States based upon adverse possession.

Added Pub.L. 92-562, § 3(a), Oct. 25, 1972, 86 Stat. 1176.

Appendix H—28 U.S.C. § 2410—Actions Affecting Property on Which United States Has Lien.

§ 2410. Actions affecting property on which United States has lien

(a) Under the conditions prescribed in this section and section 1444 of this title for the protection of the United States, the United States may be named a party in any civil action or suit in any district court, or in any State court having jurisdiction of the subject matter—

(1) to quiet title to,

(2) to foreclose a mortgage or other lien upon,

(3) to partition,

(4) to condemn, or

(5) of interpleader or in the nature of interpleader with respect to,

real or personal property on which the United States has or claims a mortgage or other lien.

(b) The complaint or pleading shall set forth with particularity the nature of the interest or lien of the United States. In actions or suits involving liens arising under the internal revenue laws, the complaint or pleading shall include the name and address of the taxpayer whose liability created the lien and, if a notice of the tax lien was filed, the identity of the internal revenue office which filed the notice, and the date and place such notice of lien was filed. In actions in the State courts service upon the United States shall be made by serving the process of the court with a copy of the complaint upon the United States attorney for the district in which the action is brought or upon an assistant United States attorney or clerical employee designated by the United States attorney in writing filed with the clerk of the court in which the action is

brought and by sending copies of the process and complaint, by registered mail, or by certified mail, to the Attorney General of the United States at Washington, District of Columbia. In such actions the United States may appear and answer, plead or demur within sixty days after such service or such further time as the court may allow.

(c) A judgment or decree in such action or suit shall have the same effect respecting the discharge of the property from the mortgage or other lien held by the United States as may be provided with respect to such matters by the local law of the place where the court is situated. However, an action to foreclose a mortgage or other lien, naming the United States as a party under this section, must seek judicial sale. A sale to satisfy a lien inferior to one of the United States shall be made subject to and without disturbing the lien of the United States, unless the United States consents that the property may be sold free of its lien and the proceeds divided as the parties may be entitled. Where a sale of real estate is made to satisfy a lien prior to that of the United States, the United States shall have one year from the date of sale within which to redeem, except that with respect to a lien arising under the internal revenue laws the period shall be 120 days or the period allowable for redemption under State law, whichever is longer, and in any case in which, under the provisions of section 505 of the Housing Act of 1950, as amended (12 U.S.C. 1701k), and subsection (d) of section 1820 of title 38 of the United States Code, the right to redeem does not arise, there shall be no right of redemption. In any case where the debt owing the United States is due, the United States may ask, by way of affirmative relief, for the foreclosure of its own lien and where the property is sold to satisfy a first lien held by the United States, the United States may bid at the sale

such sum, not exceeding the amount of its claim with expenses of sale, as may be directed by the head (or his delegate) of the department or agency of the United States which has charge of the administration of the laws in respect to which the claim of the United States arises.

(d) In any case in which the United States redeems real properly under this section or section 7425 of the Internal Revenue Code of 1954, the amount to be paid for such property shall be the sum of—

(1) the actual amount paid by the purchaser at such sale (which, in the case of a purchaser who is the holder of the lien being foreclosed, shall include the amount of the obligation secured by such lien to the extent satisfied by reason of such sale),

(2) interest on the amount paid (as determined under paragraph (1)) at 6 percent per annum from the date of such sale, and

(3) the amount (if any) equal to the excess of (A) the expenses necessarily incurred in connection with such property, over (B) the income from such property plus (to the extent such property is used by the purchaser) a reasonable rental value of such property.

(e) Whenever any person has a lien upon any real or personal property, duly recorded in the jurisdiction in which the property is located, and a junior lien, other than a tax lien, in favor of the United States attaches to such property, such person may make a written request to the officer charged with the administration of the laws in respect of which the lien of the United States arises, to have the same extinguished. If after appropriate investigation, it appears to such officer that the proceeds from the sale of the property would be insufficient to wholly or partly

satisfy the lien of the United States, or that the claim of the United States has been satisfied or by lapse of time or otherwise has become unenforceable, such officer shall so report to the Comptroller General who may issue a certificate releasing the property from such lien.

June 25, 1948, c. 646, 62 Stat. 972; May 24, 1949, c. 139, § 119, 63 Stat. 105; July 7, 1958, Pub.L. 85-508, § 12(h), 72 Stat. 348; June 11, 1960, Pub.L. 86-507, § 1(20), 74 Stat. 201; Nov. 2, 1966, Pub.L. 89-719, Title II, § 201, 80 Stat. 1147.

Opposition

FILED
MAR 5 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-1231

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

BEDFORD ASSOCIATES, *et al.*,
Petitioners,

v.

UNITED STATES OF AMERICA and
THE BOWERY SAVINGS BANK,
Respondents.

BEDFORD ASSOCIATES, *et al.*,
Petitioners,

v.

THE BOWERY SAVINGS BANK and
UNITED STATES OF AMERICA,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF RESPONDENT THE BOWERY SAVINGS BANK IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

EARL H. NEMSER
One Wall Street
New York, New York 10005
(212) 908-7000
Attorney for Respondent
The Bowery Savings Bank

Of Counsel:
CADWALADER, WICKERSHAM & TAFT
TERENCE F. GILHEANY
HOWARD R. HAWKINS, JR.
JOHN F. MARIANI

COUNTERSTATEMENT OF SECOND QUESTION PRESENTED FOR REVIEW*

Does 28 U.S.C. § 2409a, which provides: "The United States may be named as a party defendant in a civil action . . . to adjudicate a disputed title to real property in which the United States claims an interest," permit a foreclosing mortgagee to maintain an action against the United States to quiet title to property in which the United States claims a leasehold interest, by cutting off the United States' claimed interest as junior to the lien of the mortgage?

---

* This brief does not address the first question petitioners present for review, involving the Public Buildings Act, which arises out of claims and counterclaims between the other parties to this litigation.

TABLE OF CONTENTS

	Page
COUNTERSTATEMENT OF SECOND QUESTION PRESENTED FOR REVIEW	i
TABLE OF AUTHORITIES	iii
STATUTORY PROVISIONS INVOLVED	2
COUNTERSTATEMENT OF THE CASE	2
SUMMARY OF ARGUMENT	3
ARGUMENT: REASONS FOR DENYING THE WRIT	4
I. The Language of the Statute Itself and Its Legislative History Establish that This Action Was Properly Brought Under 28 U.S.C. § 2409a	4
II. The Decision of the Court of Appeals Does Not Conflict with the Decision of Any Other Court and Is Supported by Prior Decisions Under § 2409a	7
CONCLUSION	9

TABLE OF AUTHORITIES

	Page
CASES:	
California v. *Arizona*, 440 U.S. 59 (1979)	7, 8
Cohens v. *Virginia*, 6 Wheat. 264 (1821)	8
County of Patrick v. *United States*, 596 F.2d 1186 (4th Cir. 1979)	7
Fidelity Federal Savings & Loan Ass'n v. *United States*, 445 F. Supp. 683 (M.D. Tenn. 1978)	7
Hatter v. *United States*, 402 F. Supp. 1192 (E.D. Cal. 1975)	8
Indian Towing Co. v. *United States*, 350 U.S. 61 (1955)	8
Kinscherff v. *United States*, 586 F.2d 159 (10th Cir. 1978) (*per curiam*)	7, 8
Leo Sheep Co. v. *United States*, 440 U.S. 668 (1979)	7
Markham v. *Cabell*, 326 U.S. 404 (1945)	4, 5
Platt v. *Union Pacific R.R.*, 99 U.S. 48 (1878)	4, 5
Prater v. *United States*, 612 F.2d 157, *aff'd on rehearing*, 618 F.2d 263 (5th Cir. 1980)	7, 8
Stubbs v. *United States*, 620 F.2d 775 (10th Cir. 1980)	8
Touche Ross & Co. v. *Redington*, 442 U.S. 560 (1979)	4
United States v. *Bedford Associates*, 657 F.2d 1300 (2d Cir. 1981)	2
United States v. *Drinkwater*, 434 F. Supp. 457 (E.D. Va. 1977)	5

Page

FEDERAL STATUTES:

28 U.S.C. § 1346(f) 2, 3, 5

28 U.S.C. § 2409a ..... *passim*

28 U.S.C. § 2410 ..... 2, 6

LEGISLATIVE MATERIALS:

H.R. Rep. No. 92-1559, 92d Cong., 2d Sess. (1972) 5, 6, 8

S. Rep. No. 92-575, 92d Cong., 1st Sess. (1971) 6, 8

SUPREME COURT RULES:

Rule 17 3

Rule 28.1 2

No. 81-1231

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

BEDFORD ASSOCIATES, *et al.*,

Petitioners,

v.

UNITED STATES OF AMERICA and
THE BOWERY SAVINGS BANK,

Respondents.

BEDFORD ASSOCIATES, *et al.*,

Petitioners,

v.

THE BOWERY SAVINGS BANK and
UNITED STATES OF AMERICA,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF RESPONDENT THE BOWERY SAVINGS BANK IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent The Bowery Savings Bank ("Bowery") submits this brief in opposition to the petition of Bedford Associates, *et al.*, for a writ of certiorari to review the opinion and judgment of the United States Court of Appeals for the Second Circuit filed March 31, 1981 in *United States* v. *Bedford Associates*, 657 F.2d 1300 (2d Cir. 1981).[1] The opinion of the court of appeals is set forth in petitioners' Appendix to Petition at 1a-46a.

STATUTORY PROVISIONS INVOLVED

Title 28 U.S.C. § 2409a, entitled "Real property quiet title actions," is set forth in the Appendix to Petition at 98a-99a.

Title 28 U.S.C. § 2410, entitled "Actions affecting property on which United States has lien," is set forth in the Appendix to Petition at 100a-103a.

Title 28 U.S.C. § 1346(f) provides:

> The district courts shall have exclusive original jurisdiction of civil actions under section 2409a to quiet title to an estate or interest in real property in which an interest is claimed by the United States.

COUNTERSTATEMENT OF THE CASE

This litigation involves a triangular dispute among petitioners and respondents concerning the premises located at 120 Church Street in New York City ("120 Church

---

[1] The following entities, which constitute all of respondent Bowery's subsidiaries and affiliates, are listed pursuant to Supreme Court Rule 28.1:

Sutphin Site Six Development Corp.
3rd & 60th Associates

Street"). The facts as they relate to the jurisdictional question raised by the petition are as follows.

On March 20, 1979, respondent Bowery, as mortgagee, commenced an action against petitioners and respondent United States in the United States District Court for the Southern District of New York under 28 U.S.C. §§ 1346(f) and 2409a *inter alia*. By the first claim in its compaint, Bowery sought to quiet title to 120 Church Street by a declaratory judgment removing the cloud on title created by the United States' claimed leasehold interest. By its second claim for relief, Bowery sought a judgment of foreclosure cutting off the interest of the owner-mortgagor Bedford in 120 Church Street and the tenancy interest of the United States, if any, as junior to the lien of Bowery's mortgage. The district court determined that it had subject matter jurisdiction under 28 U.S.C. §§ 1346(f) and 2409a to hear Bowery's action against the United States, and ruled that the United States' claimed leasehold interest in 120 Church Street was nothing more than a holdover tenancy which was extinguished by the judgment of foreclosure. The Court of Appeals for the Second Circuit affirmed these rulings.

SUMMARY OF ARGUMENT

The petition should be denied. The unambiguous language of § 2409a, its legislative history, and the cases decided under the section demonstrate that § 2409a encompasses all claims to remove clouds on title to property in which the United States claims an interest, other than a security interest, water rights, mortgage or other lien. Thus, the court of appeals' reading of the statute is correct, and the facts of record here fall within its ambit. Moreover, the decision below is in accord with decisions in other circuits, and there has been no contrary decision. Accordingly, the petition should be denied. *See* Supreme Court Rule 17.

ARGUMENT: REASONS FOR DENYING THE WRIT

I.

The Language of the Statute Itself and Its Legislative History Establish that This Action Was Properly Brought Under 28 U.S.C. § 2409a.

This Court has often stated that judicial inquiry into Congress' intent in enacting a statute must start with the words of the statute itself. *E.g., Touche Ross & Co.* v. *Redington,* 442 U.S. 560, 568 (1979). When determining a statute's meaning, each section of the statute must be interpreted with reference to every other section so as to produce an integrated whole. *Markham* v. *Cabell,* 326 U.S. 404, 411 (1945). Any interpretation that renders portions of the statute superfluous or unnecessary should be rejected. *Platt* v. *Union Pacific R.R.,* 99 U.S. 48, 58 (1878).

Disregarding these time-honored rules of statutory construction, petitioners argue that § 2409a is strictly limited to disputes over title or fee ownership. By selecting only certain words from § 2409a(a) and ignoring the other provisions of the statute, particularly § 2409a(e), petitioners conclude that § 2409a applies only to actions in which title or ownership is in dispute between plaintiff and the United States.

A reading of the statute as a whole demonstrates the fallacy of petitioners' contention. Section 2409a(a) refers to actions "to adjudicate a disputed title," and then goes on to say "in property in which the United States claims *an interest* . . . ." (Emphasis added). Likewise, § 2409a(e) requires that plaintiff's complaint set forth with particularity "the nature of the *right,* title, *or interest* which the plaintiff claims in the real property . . . and the *right,* title, *or interest* claimed by the United States." (Emphasis added). To interpret § 2409a to include only *title* disputes between plaintiff and the United States would render superfluous the words "right" and "interest" in § 2409a(a)

and (c). This the Court will not do. *See Platt* v. *Union Pacific R.R., supra.* As the court of appeals noted below, Congress' use of the phrase "right, title, or interest" in § 2409a(c) is a clear indication that § 2409a governs more than disputes in which the parties each claim title. *See* App. at 33a-35a.

Moreover, 28 U.S.C. § 1346(f), the jurisdictional counterpart to § 2409a, uses language equally as broad. Section 1346(f) confers original jurisdiction on the district courts to hear actions brought under § 2409a "to quiet title to *an estate or interest* in real property in which *an interest* is claimed by the United States." (Emphasis added). Thus, a harmonious reading of § 2409a(a) and (c) with § 1346(f) compels the conclusion that Bowery's action was properly brought under § 2409a against the United States, which claimed a leasehold interest in 120 Church Street. *Markham* v. *Cabell, supra.*[2]

The legislative history of § 2409a also supports the conclusion that Bowery's action was properly brought under that statute. The House Report makes clear that § 2409a was designed to encompass a variety of suits by holders of various interests or rights in real property, including some

---

[2] Further support for this interpretation may be gained from analyzing § 2409a(b), which provides that the United States must elect to quit the premises or pay just compensation for continued occupancy in the event of a final determination adverse to its right to possession or control. The necessary corollary of this provision is that if the United States elects *not* to pay just compensation, then it has no right to continued possession or control of the premises. In order to be a final, adverse determination, therefore, an adjudication must cut off or extinguish the United States' claimed right. *See United States* v. *Drinkwater*, 434 F. Supp. 457, 463 (E.D. Va. 1977). Thus, in this case, the court of appeals correctly determined that the district court had jurisdiction not only to declare what interest, if any, the United States had in 120 Church Street and that such interest was subordinate to the lien of Bowery's mortgage, but also to terminate that interest by foreclosure. Otherwise, any determination adverse to the United States' claimed right would not be "final" as required by § 2409a. *See* 28 U.S.C. § 2409a(b); H.R. Rep. No. 92-1559, 92d Cong., 2d Sess. 9 (1972).

far less substantial than those at issue in this case. H.R. Rep. No. 92-1559, 92d Cong., 2d Sess. 6, 9 (1972) (*"House Report"*). Likewise, in the executive communication transmitting the preliminary draft of § 2409a to the Senate, the Attorney General wrote that "quieting of title where the plaintiff claims an estate less than a fee simple . . . is likewise included in the terms of the proposed statute," and that "[p]ossession in the plaintiff is not required." S. Rep. No. 92-575, 92d Cong., 1st Sess. 5, 6 (1971) (*"Senate Report"*).

Contrary to petitioners' argument (Petition at 21), the Attorney General's communication does not indicate that all actions involving mortgage foreclosures are excluded from the scope of § 2409a. Rather, consistent with the statutory scheme which includes both § 2410 and § 2409a, the Attorney General simply observed that foreclosure actions *to cut off subordinate government liens* are controlled by § 2410, not by § 2409a. *Senate Report* at 6.[3] Nothing in § 2410 is inconsistent with the court of appeals' determination that Bowery could seek to quiet title in 120 Church Street under § 2409a; indeed, the court of appeals' opinion points out how these two sections complement each other. *See* App. at 35a-37a. Section 2410 deals solely with disputes involving property in which the United States has a secured interest—property in which the "United States has or claims a mortgage or other lien." 28 U.S.C. § 2410(a)(2). The United States is asserting no such interest here. In addition, the legislative history clearly indicates that § 2409a was intended to effect a broader waiver of sovereign immunity than had been effected earlier by § 2410. *See House Report* at 5-7; *Senate Report* at 2.

---

[3] This portion of the Attorney General's communication plainly referred to waivers of sovereign immunity other than § 2409a, one of which is § 2410. *Senate Report* at 6. As the House Report also indicates, the statute as finally enacted by Congress was intended to have a scope broader than that set forth in S. 2805, the first Justice Department proposal. *See House Report* at 4-7. *See also Senate Report* at 2.

II.

The Decision of the Court of Appeals Does Not Conflict with the Decision of Any Other Court and Is Supported by Prior Decisions Under § 2409a.

Consistent with prior judicial interpretations of § 2409a, the court of appeals recognized that the statute was enacted to allow the United States to be made a defendant in any action, like this one, brought to remove a cloud on title to real property in which the United States claims an interest. Every court which has addressed the question has reached a similar conclusion, in situations involving a variety of property interests. *See, e.g., Leo Sheep Co.* v. *United States,* 440 U.S. 668 (1979) (government easements); *California* v. *Arizona,* 440 U.S. 59 (1979) (boundary dispute); *Prater* v. *United States,* 612 F.2d 157, *aff'd on rehearing,* 618 F.2d 263 (5th Cir. 1980) ("Because Prater claimed a right, title or interest in the property, Section 2409a served as a waiver of sovereign immunity . . . ."); *County of Patrick* v. *United States,* 596 F.2d 1186 (4th Cir. 1979) (holders of easements and mortgages); *Fidelity Federal Savings & Loan Ass'n* v. *United States,* 445 F. Supp. 683 (M.D. Tenn. 1978) (mortgagee). These cases decided under § 2409a routinely have involved complete adjudications of the priority of interests and have resulted in the termination or extinguishment of claimed interests adverse to those of the prevailing parties.

Petitioners lift out of context the phrase "typical quiet title suit" from the decision in *Kinscherff* v. *United States,* 586 F.2d 159, 160 (10th Cir. 1978) (*per curiam*), as if those four words, standing alone, constitute the sum and substance of the case law under § 2409a. (Petition at 22). A proper reading of *Kinscherff* reveals, however, that the Court of Appeals for the Tenth Circuit determined that the concept of "quiet title" under § 2409a is as broad as that concept has developed "in the various states in this country through statutory and case law." 586 F.2d at 160. Thus, *Kinscherff* is entirely consistent with the decision of the court of

appeals below. *See* App. at 35a. Moreover, petitioners' misinterpretation of *Kinscherff* ignores the legislative history and the other cases decided under § 2409a, which confirm that § 2409a encompasses actions to remove any cloud on title to property in which the United States claims an interest; the statute is not meant to conform strictly to the common law action of *quia timet*. *Senate Report* at 5-6; *House Report* at 6; *Prater* v. *United States, supra*, 612 F.2d at 159 & n. 5. *Accord, Hatter* v. *United States*, 402 F. Supp. 1192, 1195 (E.D. Cal. 1975). *See also Stubbs* v. *United States*, 620 F.2d 775, 781 (10th Cir. 1980). Indeed, with the exception of those situations expressly excluded by the terms of § 2409a(a), no reported decision has ever dismissed an action timely brought under § 2409a by the holder of a legal right or interest in property in which the United States claimed an interest.

* * * * *

As the court of appeals held, the language of § 2409a, the legislative history, and the judicial decisions are consistently clear that Congress waived immunity for a broad range of actions when it enacted § 2409a. *See* App. at 34a-36a. *See also* 28 U.S.C. § 2409a(a); *House Report* at 6, 9; *Prater* v. *United States, supra*. In essence, petitioners seek a reversal of the decision below based on the argument that it is contrary to the canon of statutory construction that a waiver of sovereign immunity "cannot be implied but must be unequivocally expressed." (Petition at 23). But even in light of that doctrine, this Court has long emphasized that when Congress has waived immunity in words clear enough to be given application, courts should not import immunity back into a statute designed to limit it. *Indian Towing Co.* v. *United States*, 350 U.S. 61, 69 (1955); *Cohens* v. *Virginia*, 6 Wheat. 264, 380 (1821). Here Congress has quite clearly waived the United States' immunity from actions, like Bowery's, brought to quiet title to real property in which the United States claims an interest. *California* v. *Arizona, supra*, 440 U.S. at 65. Therefore, no reason exists for this Court to review, much less disturb, the court of appeals' decision.

CONCLUSION

The petition for a writ of certiorari should be denied.

Dated: New York, New York
March 5, 1982

EARL H. NEMSER

One Wall Street
New York, New York 10005
(212) 908-7000

Attorney for Respondent
The Bowery Savings Bank

Of Counsel:

CADWALADER, WICKERSHAM & TAFT

TERENCE F. GILHEANY
HOWARD R. HAWKINS, JR.
JOHN F. MARIANI

Opposition

2

Office - Supreme Court, U.S.
FILED
MAR 12 1982
ALEXANDER L. STEVAS

No. 81-1231

In the Supreme Court of the United States

OCTOBER TERM, 1981

BEDFORD ASSOCIATES, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA AND
THE BOWERY SAVINGS BANK

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General

CAROL E. DINKINS
Assistant Attorney General

JACQUES B. GELIN
ROBERT L. KLARQUIST
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTIONS PRESENTED

1. Whether an offeror may unilaterally withdraw or modify an offer to lease real property to the United States, submitted in response to the government's solicitation, where the terms of the solicitation require that all offers tendered remain open for a definite period in order to provide an opportunity for securing congressional approval of the arrangement as required by Section 7(a) of the Public Building Act of 1959, 40 U.S.C. 606(a), and the offeror extended the life of its offer, knowing that the government considered the offer not to be subject to further modification prior to acceptance.

2. Whether the Quiet Title Act, 28 U.S.C. 2409a, confers jurisdiction on the district courts to adjudicate mortgage foreclosure actions against the United States.

TABLE OF CONTENTS

Page

Opinions below 1

Jurisdiction 1

Statement 1

Argument 10

Conclusion 16

TABLE OF AUTHORITIES

Cases:

National League of Cities v. *Usery*, 426 U.S. 833 16

United States v. *Bedford Associates*, 618 F. 2d 904 5

Warth v. *Seldin*, 422 U.S. 490 16

Statutes:

Declaratory Judgment Act, 28 U.S.C. 2201-2202 5

Public Buildings Act of 1959, 40 U.S.C. 601 *et seq.*:

Section 7, 40 U.S.C. 606 ..... 10, 11, 12
Section 7(a), 40 U.S.C. 606(a) 3, 8
Section 7(b), 40 U.S.C. 606(b) 12

Quiet Title Act:

28 U.S.C. 1346(f) 5

28 U.S.C. 2409a 5, 10, 14, 15

28 U.S.C. 2409a(a) 6, 10, 15

28 U.S.C. 2409a(b) 10

Page

Statutes—Continued:

28 U.S.C. 1345 4

28 U.S.C. 2410(a) 5

Miscellaneous:

H.R. Rep. No. 92-1559, 92d Cong., 2d Sess. (1972) 14

In the Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-1231

BEDFORD ASSOCIATES, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA AND
THE BOWERY SAVINGS BANK

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-46a) is reported at 657 F. 2d 1300. The opinions of the district court (Pet. App. 47a-84a, 85a-89a) are reported at 491 F. Supp. 851 and 491 F. Supp. 848 respectively.

JURISDICTION

The judgment of the court of appeals (Pet. App. 90a-92a) was entered on March 31, 1981. The order of the court of appeals denying rehearing (Pet. App. 93a-94a) was entered on October 8, 1981. The petition for a writ of certiorari was filed on December 31, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

This case embraces two actions, consolidated below, arising from a dispute as to the rights and liabilities of three

parties interested in a 21-story office building located at 120 Church Street in New York City. Petitioner Bedford Associates, a partnership, owns the building and the Bowery Savings Bank ("Bowery") holds a consolidated first mortgage on the property.[1] The United States, acting through the General Services Administration ("GSA"), occupies the premises, which has housed the Manhattan District Headquarters of the Internal Revenue Service ("IRS") since 1962 (Pet. App. 1a-2a & n.1). The relevant facts of this litigation may be summarized as follows:

1. In 1962, GSA and petitioner executed the initial lease for the 120 Church Street building. The 1962 lease provided for an initial ten-year term commencing November 1, 1963, at a fixed annual rental. The agreement gave GSA two five-year renewal options, and fixed a higher annual rent for each successive option period. The government exercised the first renewal option in 1973, but, because the government had decided to seek better quarters for the IRS facility, the second renewal option was not exercised (Pet. App. 3a). In June 1977, GSA solicited several prospective lessors, including petitioner, for offers. GSA's solicitation required that offers tendered be kept open through April 15, 1978. By August 15, 1977, when the solicitation period closed, GSA had received three offers including an offer from petitioner covering the existing IRS quarters at 120 Church Street. Petitioner offered to lease 350,000 square feet of space at an annual rental of $3,073,000, and proposed renovations that, it estimated, would cost about $1 million (Pet. App. 4a, 8a).

Although Bedford's offer was not wholly satisfactory from GSA's viewpoint,[2] the other two offers were also

---

[1]The other petitioners are affiliated with Bedford Associates; we employ the singular term "petitioner" to refer to Bedford Associates (see Pet. App. 2a n.1).

[2]GSA deemed Bedford's proposed renovations insufficient; the offer was also for more space than the solicitation requested (Pet. App. 4a).

deficient in various respects (Pet. App. 4a). Following negotiations with each offeror, GSA decided to reject the offers of petitioner's competitors (Pet. App. 4a). In addition, by letter dated November 18, 1977, petitioner proposed a modification of its offer under which it would not be entitled to the full new rental at the outset of the new lease term. Instead, under a proposed formula, GSA would pay the increased rent only for those floors that had by then been renovated and would pay for the remaining floors at a rate based upon the second renewal option rate ($2,226,194 annually). Each time two additional floors were renovated, the government would commence paying the new rate as to those additional floors (Pet. App. 9a). Subsequently, by letter dated March 2, 1978, petitioner proposed an alternative: that GSA pay rent at the first renewal option rate of $2,115,499, plus all utilities, until the completion of construction or 18 months after the new lease was executed, whichever came first. On April 5, 1978, GSA responded in writing that it would consider the proposal only after a lease agreement had been reached (Pet. App. 9a-10a).

2. Section 7(a) of the Public Buildings Act of 1959, 40 U.S.C. 606(a), requires GSA to submit proposed leases requiring an annual rent in excess of $500,000 to the Public Works Committee of both Houses of Congress for their approval.[3] Hence, GSA was required to submit Bedford's offer to Congress before GSA could accept it on behalf of the government. When GSA initially solicited offers for space for the IRS facility in June 1977, it contemplated that the entire process of negotiations, congressional approval, and award of a lease would be completed by April 1978, several months before the lease would commence on

---

[3]The constitutionality of this provision has not been challenged in this action.

November 1, 1978. Because negotiations were not expeditiously concluded, however, GSA did not send a final prospectus concerning petitioner's offer to Congress until June 1978. Because of the delay, GSA repeatedly requested that petitioner extend its offer beyond the April 15, 1978, expiration date. Petitioner granted the requested extensions, giving GSA until October 31, 1978, to accept its offer (Pet. App. 8a, 58a).

On October 30, 1978, after having obtained congressional approval, GSA delivered to Bedford an award letter accepting petitioner's offer, as amended through the negotiations. The IRS facility remained in place after expiration of the old lease term. Subsequently, GSA presented petitioner with a proposed lease for execution, which included the terms respecting rentals to be paid during renovations suggested in petitioner's letter of November 18, 1977. Petitioner, however, rejected the proposed lease, claiming that it did not conform to the solicitation and award. Although no renovations were undertaken, on March 8, 1979, petitioner, claiming substantial losses, demanded that GSA pay additional rent and utilities for occupancy of the 120 Church Street premises. On March 20, 1979, petitioner notified GSA that it would close the premises and terminate building services on March 23, 1979, unless GSA paid "a reasonable and fair rent" (Pet. App. 4a-5a).

3. On March 22, 1979, the United States filed suit against Bedford, seeking a temporary restraining order and preliminary injunction against Bedford's threatened "lockout."[4] The government also sought specific performance of the new lease, including a permanent injunction against interference with its access to the building. In addition, the government requested damages for the breach of the new

---

[4]Jurisdiction was based upon 28 U.S.C. 1345.

lease. Respondent Bowery was allowed to intervene in the action (Pet. App. 5a).[5]

Just one day before the government filed its action, Bowery, invoking the district court's jurisdiction pursuant to the Quiet Title Act, 28 U.S.C. 2409a and 1346(f), filed a mortgage foreclosure action naming both petitioner, which had fallen in arrears in its mortgage payments, and the United States as defendants.[6] Bowery sought a declaratory judgment quieting title to the building, foreclosure of the outstanding mortgage against petitioner's and the United States' interests, and an assignment of rents (Pet. App. 6a).

The district court granted a preliminary injunction barring petitioner from closing the building, but also required GSA to make certain payments to petitioner, *pendente lite*.[7] Thereafter, petitioner filed its answer to the

---

[5]Petitioner filed a counterclaim seeking damages from GSA in the amount of the difference between the fair market rental value of the premises and the rents being paid (Pet. App. 6a).

[6]The complaint also recited as a jurisdictional predicate the Declaratory Judgment Act, 28 U.S.C. 2201-2202, and 28 U.S.C. 2410(a), which grants the United States' consent to its joinder in state or federal court proceedings to quiet title to, foreclose a mortgage upon, partition or condemn, property in which the United States has a mortgage or lien interest.

[7]The preliminary injunction was granted on the condition that GSA pay rent to Bowery at the second renewal option rate and, in addition, that GSA pay all utilities without setoff from the rental payments. The government appealed, contending, *inter alia*, that the district court lacked authority to require GSA to make the payments. The court of appeals held that the district court could properly condition the preliminary injunction upon the rental payments; the court of appeals, however, found that the district court's determination of the amounts owing to Bedford was excessive, *United States* v. *Bedford Associates*, 618 F. 2d 904 (2d Cir. 1980); see Pet. App. 6a. After the court of appeals' ruling on the government's appeal from the terms of the preliminary injunction, proceedings resumed in the district court, culminating in the court of appeals' decision on a second appeal, review of which is now sought.

government's complaint asserting that its negotiations with GSA had not resulted in a lease agreement. Petitioner also contended, in the alternative, that any agreement reached was unenforceable on grounds of unconscionability, misrepresentation, and duress. Petitioner asserted that the district court lacked subject matter jurisdiction to foreclose its interest upon Bowery's mortgage foreclosure action, and contended further that the foreclosure was barred by laches. The United States contended that foreclosure of its leasehold was barred by sovereign immunity and moved for dismissal of Bowery's complaint (Pet. App. 6a-7a).

On March 18, 1980, the district court denied the government's motion to dismiss Bowery's complaint (Pet. App. 85a-89a). Rejecting the government's argument that the doctrine of sovereign immunity precluded Bowery's suit against it, the district court noted that the Quiet Title Act, 28 U.S.C. 2409a(a), permits the United States to be joined as a defendant in actions "to adjudicate a disputed title to real property in which the United States claims an interest," and concluded that Congress had thereby waived sovereign immunity as to an action by a mortgagee to foreclosure against the interests of the United States as occupant or lessee (Pet. App. 85a-89a). Pendent jurisdiction of Bowery's claim against petitioner was also sustained (*id.* at 89a).

On May 24, 1980, the district court entered final judgment and an accompanying opinion (Pet. App. 47a-84a) denying all relief to the United States and awarding substantial relief to petitioner and to Bowery. First, applying the rule that no contract can be formed without a "meeting of the minds" on all essential terms or where some essential terms remain too indefinite, the district court found that petitioner and GSA had not reached a binding agreement to enter a lease. The court found an absence of agreement between the parties as to the square footage to be rented, the

rates to be charged for overtime services, and any adjustments in the rental rate to compensate petitioner for the increased construction costs caused by GSA's delays. The district court concluded that Bedford had believed that these items could be negotiated after congressional approval had been obtained and that Bedford had not intended to be bound until the entire leasing agreement was completed and reduced to an integrated contract (Pet. App. 67a-70a).

Second, the court ruled that even if a valid contract had been formed, the agreement was unenforceable because of unconscionability, duress, and misrepresentation by GSA during the negotiations (Pet. App. 70a-74a). Third, regarding Bowery's foreclosure action against petitioner and the United States, the court found petitioner's mortgage in default, declared that Bowery's mortgage had priority over the government's tenancy, foreclosed the mortgage against both defendants, and ordered the United States to pay to Bowery, commencing June 1, 1980, the fair market value rental as of that date for the continued occupancy of the premises (Pet. App. 74a-80a, 84a). Finally, the court determined that the annual fair market rental of the building as of the date of trial was $4,533,350, without offset for utilities. The court entered a final judgment that (1) granted foreclosure of the mortgage as requested by Bowery, and quieted title to the building in Bowery; (2) declared that since November 1, 1978, the United States had no contractual right, title or interest in the building other than as a holdover tenant, and that the United States' tenancy was subordinate to Bowery's mortgage; (3) awarded Bedford damages against the government in the amount of $462,507.33, plus interest and costs, representing the excess of fair market rental over the amounts paid by the government to Bedford from November 1978 through February 1979; (4) awarded Bowery damages against the government in the amount of $1,252,673.96, plus interest and costs, representing the excess of fair market value over the amounts paid by

the government to Bowery from March 1979 through May 1980; and (5) ordered the government to pay rent to Bowery at an annual rate of $4,533,350, without offset for utilities, for continued occupancy of the building after June 1, 1980 (Pet. App. 15a, 84a).

4. The United States appealed. The court of appeals affirmed in part and reversed in part, with Judge Moore dissenting from the partial reversal.

Reversing the district court, the court of appeals held that the negotiations and actions of the parties had resulted in an enforceable lease. The court observed that Section 7(a) of the Public Buildings Act of 1959 requires GSA to submit proposed leases requiring an annual rent in excess of $500,000 to the Public Works Committee of both Houses of Congress for their approval and noted that, fully aware of GSA's position that the offer was not subject to modification, petitioner had repeatedly extended its offer so that the requisite congressional approval could be obtained. The court of appeals accordingly held that petitioner was bound by GSA's acceptance of the offer which GSA had, with petitioner's knowledge and acquiescence, submitted for congressional approval. The court noted that any contrary rule would permit lessors and even GSA itself to subvert the purpose of the Public Buildings Act (Pet. App. 20a-21a). Accordingly, the court of appeals held, where, as here, the terms of GSA's solicitation require offerors to hold their offers open, that requirement is enforceable even where no consideration is given (Pet. App. 24a-26a). The court explained (*id.* at 21a):

> We reach this conclusion even though GSA may have known that Bedford believed that its offer was not binding and that further negotiations would follow the award. GSA was not at liberty to present to Congress merely a bundle of "suggestions" concerning 120 Church Street, disguised, in the trappings of a formal

> prospectus, as a definite offer respecting the premises. Moreover, given the federal statutes and regulations that circumscribed GSA's actions in this matter and Bedford's status as a substantial commercial entity and longtime government lessor, any belief on Bedford's part that GSA would violate its congressional mandate was unreasonable as a matter of law. As for the prospect of further negotiations, we think this raises at most a possibility that Bedford and GSA "agreed to agree" upon troublesome terms at a later time. As discussed above, we cannot suppose that Bedford and GSA meant to renegotiate the lease *in toto* after Congress had approved it. The parties' willingness to conduct post-award negotiations therefore does not preclude the existence of an agreement in the meantime.

In addition, the court found that the uncertainties concerning the square footage to be leased and the charges to be paid for overtime services were not so substantial or material to the bargains as to prevent the formation of a contract (Pet. App. 22a-23a).

Again reversing the district court, the court of appeals determined that neither the terms of the lease nor GSA's bargaining methods were so unfair or oppressive as to preclude enforcement of the agreement in a suit for damages (Pet. App. 26a-31a). The court of appeals, however, affirmed the district court's denial of the government's request for specific performance of the lease agreement, noting that the GSA's conduct was sufficiently questionable to warrant the denial of this equitable remedy as an exercise of the district court's discretion (*id.* at 30a-31a).

Third, turning to Bowery's mortgage foreclosure action, the court of appeals rejected the government's contention that the district court lacked jurisdiction to foreclose a mortgage against the interest of the United States. Although characterizing the question as "a relatively close

one" (Pet. App. 36a), the court of appeals concluded that the Quiet Title Act, 28 U.S.C. 2409a, confers jurisdiction upon the district court to order foreclosure against the government.[8] The court also rejected the government's equitable defenses to the foreclosure action (Pet. App. 37a).

Finally, the court of appeals remanded the case with directions to the district court to adjudicate the government's claim for damages under the lease, to modify the assignment of rents to Bowery, and to enter appropriate relief in the event the government exercised its option under the Quiet Title Act (see 28 U.S.C. 2409a(b)) to retain its occupancy of the premises upon payment of just compensation (Pet. App. 37a-40a).

The United States filed a petition for rehearing and suggestion for rehearing en banc addressing only the court's holding that the Quiet Title Act confers jurisdiction to order foreclosure against the interests of the United States. The petitioner sought rehearing as well raising, however, only the question whether a new lease had been entered. The petitions for rehearing were denied on October 8, 1981 (Pet. App. 93a-94a).

ARGUMENT

Contrary to petitioners' contention, this case does not present any issue warranting review by the Court at the present time. First, the court of appeals did not announce any broad holding that Section 7 of the Public Buildings Act of 1959 mandates the creation of a new federal common law of contract formation, but, rather, rested its decision on

---

[8]The court of appeals' reasoning on this issue differed from the rationale adopted by the district court. Whereas the district court looked to state law to ascertain the meaning of the phrase "civil action * * * to adjudicate a disputed title" used in 28 U.S.C. 2409a(a) to define the scope of the waiver of sovereign immunity effected, the court of appeals found the question to be one "the answer to which must be sought in federal law" (Pet. App. 34a).

a much narrower ground of limited application. Second, while petitioners' assertion that the Quiet Title Act does not confer jurisdiction on the district court to adjudicate mortgage foreclosure actions against the United States may have merit, further review is not warranted at this time given the absence of conflicting authority.

1. Petitioners assert (Pet. 11) that the court of appeals construed Section 7 of the Public Buildings Act of 1959, 40 U.S.C. 606, so as "to fashion a new federal common law in radical departure from well-established state and federal law governing the formation of contracts." Petitioners' characterization of the decision is overbroad. Contrary to petitioner's suggestion (Pet. 13), the court of appeals did not hold that Section 7 creates a new federal common law of contract formation that renders irrevocable any offer communicated to Congress for approval under the Public Buildings Act.[9] Rather, the court merely determined that when the government solicits offers to lease property and expressly requires that offers submitted remain open for a definite period so as to allow for congressional approval pursuant to Section 7, and where the offeror has extended the life of his offer to make congressional review possible, the courts will enforce the requirement that the offer remain open notwithstanding the offeror's subjective belief that he is still free unilaterally to vary the terms of his offer.[10] In essence, the court held that Section 7 of the Public Buildings Act does not permit an offeror the benefit of assuming inconsistent positions as to the revocability of its offer. As stated by the

---

[9]The court of appeals applied general contract law principles to all contract issues other than the revocability of petitioner's offer (Pet. App. 22a-23a, 26a-30a).

[10]Accordingly, petitioners' argument (Pet. 13-17) that the Public Buildings Act itself does not render all such offers irrevocable and capable of acceptance, is misdirected.

court of appeals (Pet. App. 21a): "[G]iven the federal statutes and regulations that circumscribed GSA's actions in this matter and Bedford's status as a commercial entity and longtime government lessor, any belief on Bedford's part that GSA would violate its congressional mandate was unreasonable as a matter of law."

Petitioners contend (Pet. 13-14) that Section 7 of the Public Buildings Act does not limit GSA's authority so as to preclude acceptance of terms not corresponding precisely to those submitted to Congress. While GSA does, indeed, have some leeway to negotiate and accept changes in an agreement approved by Congress, it does not, as petitioners suggest, have unfettered discretion to change the material terms of the proposed lease agreement submitted to Congress. For instance, while Section 7(b) of the Public Buildings Act, 40 U.S.C. 606(b), authorizes the Administrator of GSA to approve minor increases in costs, it also expressly provides that "in no event shall the increase authorized by this subsection exceed 10 per centum of such estimated maximum costs." The holding of the court of appeals is therefore consistent with the statute. The court held that while Bedford's belief that it remained free to bargain over the appropriate rent after congressional approval had been obtained was unreasonable, the parties still remained free to adjust those aspects of the lease which the court found to be not material to the bargain (Pet. App. 22a-23a).

As the court of appeals observed, GSA's practice of requiring offerors to hold their offers open for a time sufficient to permit congressional review advances the policy underlying Section 7 of the Public Buildings Act. Congressional review of proposed leases would be greatly hampered if offerors remained free to revoke or modify their offers at any time prior to formal acceptance by the Administrator. The court of appeals explained (Pet. App. 20a):

> As the district court found, Bedford knew by March 2, 1978, that its initial offer, as modified would prove uneconomical for it. Nonetheless, and regardless of the fact that GSA had by then become intransigent about further modifications of the offer to be submitted to Congress and had so notified Bedford on April 5, 1978, Bedford extended the life of its offer on no fewer than seven occasions from February 28, 1978 to September 27, 1978. In view of Bedford's manifest willingness to permit GSA to go forward with the approval process—a process that Bedford should have known would lead to acceptance of its offer—Bedford cannot now be heard to say that its offer was incapable of acceptance. To uphold such a claim, as the district court did, would permit lessors such as Bedford, and indeed GSA itself, to evade statutory limitations on the procurement process and to frustrate Congress's supervision of that process.

For the foregoing reasons we submit that the decision of the court of appeals on this issue is correct. In any event, it is not alleged to, and does not, so far as we are aware, conflict with any of the decisions of this Court or any of the other courts of appeals, and accordingly does not warrant review by this Court. The decision of the court of appeals also lacks the general importance attributed to it by petitioners. The decision rests in part upon the facts of this case and the parties' unique course of dealing. For the future, the court of appeals' decision will provide an incentive to parties dealing with the United States to state clearly their intentions and to make explicit any limitations upon their offers, including any requirement of separate assent to final lease terms. Because the result in any case will turn on the steps taken by the GSA and an offeror to make clear the scope and limits of agreement, the court of appeals' decision is

unlikely to have so substantial an impact on the outcome of future cases as to warrant this Court's review.[11]

2. Petitioners also assert (Pet. 18-23) that the Quiet Title Act, 28 U.S.C. 2409a, which provides in relevant part that "[t]he United States may be named as a party defendant in a civil action * * * to adjudicate a disputed title to real property in which the United States claims an interest, other than a security interest or water rights," does not embody congressional consent to adjudication of mortgage foreclosure actions where the only interest claimed by the United States is that of a leaseholder. Petitioners' contention appears to be well-founded.[12]

---

[11]Even Judge Moore, in what he called a "Cassandra-like" dissent, focused only upon the impact of the decision upon the present parties (Pet. App. 46a).

[12]While petitioner's arguments on the merits of this question are generally sound, in our view, we do observe, in fairness, that, read in context, the language cited by petitioner (Pet. 21) from the Attorney General's comments on the bill that became the Quiet Title Act are not quite so unequivocal as might seem from the excerpt reproduced. The petitioners quote the following language reproduced in the House Report (H.R. Rep. No. 92-1559, 92d Cong., 2d Sess. 10 (1972)):

> The remedy provided in the draft bill does not apply to civil actions for the partition of lands, or to foreclose a mortgage, deed of trust or other security interest, or to cancel, remove or discharge a lien of any kind, or involving or relating to water rights.

The relevant statement continues, however, as follows (*ibid.*):

> These actions are provided for in other provisions of the Code. See secs. 1346(e) [jurisdiction of actions respecting tax liens], 1347 [jurisdiction of partition actions], 1491 [the Tucker Act; claims against the United States], 2409 [waiver of sovereign immunity as to partition actions] and 2410 [waiver of sovereign immunity as to actions affecting property on which the United States has a lien] of title 28; secs. 7424-7426 of title 26 [actions respecting tax liens], and sec. 666 of title 43 [the "McCarran Amendment," waiving sovereign immunity as to adjudication of the United States' water rights].

Throughout this litigation the government has argued that the waiver of sovereign immunity expressed in the Quiet Title Act does not extend to mortgage foreclosure actions affecting the government's leases. Indeed, it was the government, rather than the petitioners, that appealed on this issue and pursued it in a petiton for rehearing to the court of appeals. We nevertheless conclude that the point does not warrant review by this Court at this time. The Quiet Title Act, enacted in 1972, is a relatively new statute. The question presented here is one of first impression; obviously there is no conflict of authorities requiring resolution. In the circumstances, we suggest that the appropriate course would be to deny certiorari at this time to await further litigation, if any, that may shed additional light on this matter.[13]

Thus the Attorney General's statement that the Quiet Title Act does not embrace foreclosure actions, rests, at least in part upon language in Section 2409a(a) that provides:

> This section does not apply to trust or restricted Indian lands, nor does it apply to or affect actions which may be or could have been brought under sections 1346, 1347, 1491, or 2410 of this title, sections 7424, 7425, or 7426 of the Internal Revenue Code of 1954, as amended (26 U.S.C. 7424, 7425, and 7426) or section 208 of the Act of July 10, 1952 (43 U.S.C. 666).

In view of the foregoing it is not entirely clear that Congress did not, by enacting Section 2409a, intend to consent to suits to foreclose an estate of the United States subordinate to a mortgage. Nonetheless, because of the rule of strict construction applicable to waivers of sovereign immunity, we remain unpersuaded that the foreclosure action was, as to the United States, properly deemed an action "to adjudicate a disputed title to real property" within the meaning of the Quiet Title Act.

[13]We do not deem this suggestion unfair to petitioners. It is uncontested that Bedford was in default on its mortgage (Pet. App. 6a-7a) and it appears that Bowery could have foreclosed petitioner's interest by bringing an action in state court. If any party is prejudiced by the holding of the court of appeals here, it is the United States.

We note as well that is is not entirely clear that the sovereign immunity defense may be asserted by petitioners, for the right asserted belongs

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE
Solicitor General

CAROL E. DINKINS
Assistant Attorney General

JACQUES B. GELIN
ROBERT L. KLARQUIST
Attorneys

MARCH 1982

---

to a third party, the United States. See *Warth* v. *Seldin*, 422 U.S. 490, 499 (1975); compare *National League of Cities* v. *Usery*, 426 U.S. 833, 836-837 n.7 (1976).

DOJ-1982-03